United States Court of Appeals

for the Second Circuit

APPENDIX

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75-1004

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1004

UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY M. NATELLI, and
JOSEPH SCANSAROLI,
Defendants-Appellants.

JOINT APPENDIX
VOLUME I
Pages A1 to A336

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UNITED STATES COURT OF APPEALS
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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DOCKET ENTRIES

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D. C. Form No. 100
CRIMINAL DOCKET

JUDGE TYLER — 74 CRIM. 43

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.: 12-31-74
vs.	Harold F. McGuire,Jr-AUSA
(1) CORTES W. RANDELL-1-11,12	264-6570
(2) ROBERT C. BUSHNELL-1-11, 13 ✓	
(3) JOHN G. DAVIES-1-11	
(4) DENNIS M. KELLY-1-11,14 ✓	
(5) BERNARD J. KUREK-1-11	For Defendant:
(6) ANTHONY M. NATELLI-2 ✓	
(7) JOSEPH SCANSAROLI- 2 ✓	

ABSTRACT OF COSTS (04)	AMOUNT	CASH RECEIVED AND DISBURSED — DATE	NAME	RECEIVED	DISBURSED
Fine,					
Clerk,					
Marshal, 2,4,6,7,					
Attorney,					
Commissioner's Court,					
Witnesses,					

18:371 Conspo. to viol. securities laws.(Ct.1)
15:78ff,18:2 Filing a false proxy statement.(Ct2)
15:78j(b),78ff,18:2 Unlaw. using mails in interstate comm. in scheme to defraud in sale of securities(Cts3-11)
15:77g(a),77x Fraud in the sale and offer of securities.(Cts12-14)

(Fourteen(14) Counts)

DATE	PROCEEDINGS
1-17-74	Filed indictment. ✓
1/23/74	Randell(atty. present) Pleads not guilty. Bail fixed at $200,000. P.R.B. secured by $50,000. cash or surety and co-signed by wife. Bail to be posted by 2/1/74. Bail limits extended to work areas and residence. Bushnell(atty. present) Pleads not guilty. Bail fixed at $100,000. P.R.B. secured by $5,000. cash or surety.Bail to be posted by 2/1/74. Bail limits extended to work areas and residence. Davies(No appearance by deft.)Atty. present James Beerbauer)Court directs entry of not guilty plea. Bench Warrant ordered but stayed until 1/31/74. Kelly(atty. present)Pleads nto guilty. Bail fixed at $10,000. P.R.B. ser. by $1,000. cash or surety.Bail to be posted by 2/1/74, Bail limits extend- to work areas and residence. (over)

Docket Entries

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
1/28/74	Bernard J. Kurek(atty. Marvin Siegel)		
	Anthony J. Natteli(atty. John S. Marrin)		
	Joseph Scansaroli(atty. present)Charles Stillman)		
	Defts. plead not guilty. Bail fixed at $50,000.P.R.B.		
	Unsecured. Bail limits extended to Continental U.S.		
	All defts. motions returnable in 20 days. All defts.		
	ordered photographed and fingerprinted. Case assigned		
	to Judge Tyler for all purposes. Brieant,J.		
1-28-74	Randell(Filed letters(5) character reference and placed in file.		
1-28-74	John Davies-bench warrant issued. Tyler,J.		
1-28-74	ANTHONY NATELLI-filed personal recognizance bond with out security in the sum of $50,000.		
1-28-74	BERNARD KUREK-filed personal recognizance bond in the sum of $50,000. without security.		
1-28-74	JOSEPH SCANSAROLI-filed personal recognizance bond without security in the sum of $50,000.		
1-29-74	J. SCARSAROLLI-filed notice of appearance of atty: Morrison, Paul Stillma & Beiley by Chas. Stillman, 110 E.59th St,NYC 593-0100.		
1-29-74	A. NATELLI- filed notice of appearance by atty: Martin & Obermaier, 1 Rockefeller Plaza,NYC 10020 by John S. White,Jr. 489-1600.		
1-29-74	J. Davies- filed notice of appearance by atty: James J. Bierbower, 1625 K St, N.W. Wash. D..C. 20006 202-347-1900.		
1-30-74	C. RANDELL-filed notice of appearance by atty: Williams, Connolly & Califero by Robert Weinberg and Vincent J. Fuller,136 E 55th St, NYC .		
1-31-74	Deft John G. Davies-no appearance. Bench warrant issued. Brieant,J.		
1-31-74	Deft J. Davies (atty presnet) pleads not guilty. Deft to be fingerprinted & photographed. Bail stauts $25,000. P.R.B. secured by $2,500. cash or surety. Deft to post bail by 2-1-74 at 4 PM. Tyler,J.		
2-1-74	Hearing (attyspresent) motions to be filed no later than 4-1-74, Deft Bushnell, New Bail status $50,000. P.R.B. secured by $2,500. cash or surety. Deft to post bail by 2-5-74 noon. Tyler,J.		

cont'd on next page

Docket Entries

74 Cr 43 Judge Tyler Page 3

DATE	PROCEEDINGS
2/11/74	C. Randell- Filed orig. papers filed with Mag. Raby: docket entry sheet appearance bond.
2/1/74	J. Davies-filed appearance bond in the sum of $25,000.
2/5/74	R. Bushnell- filed appearance bond in the sum of $50,000.
2/1/74	D. Kelly - filed appearance bond in the sum of $10,000.
2/21/74	Randell-filed notice of motion re: quash subpoena.
2/21/74	Filed memo-end. on motion dtd this date. Motion denied on the basis of information submitted to the Court by the U.S. Atty ex parte and in camera today. Further the minutes of that in camera submission are not to be transcribed by the court reporter until otherwise directed by an appropriate court order. Tyler,J. mn
3/4/74	B. KUREK-filed notice of appearance of atty Plato Cacheius,Esq. 1709 N.Y. Ave,Wash,D.C. 20006. Local counsel- Segal & Hudley 375 Park Ave,NYC Pl 3-7800.
3/22/74	PRE-TRIAL CONFERENCE HELD BY Tyler,J.
4/3/74	Deft Bernard J. Kurek (atty present) withdraws plea of not guilty and Pleads guilty to count #2 only. Pre-sentence investigation ordered. Sentence adj sine die. Deft. cont'd on present bail to time of sentence. Tyler,J.
4/10/74	Filed Stip & Order that the bail limits of deft Natelli is ext. to include him to travel to Italy and France for the period from Apr 12 to Apr 28,etc. Tyler,J.
4/12/74	Filed deft R. Bushnell's notice of motion to dismiss count two of the indictment on the ground of duplicity and for a bill of particulars.
4/12/74	Filed memo of law of deft. R. Bushnell.
4/12/74	Filed motion of deft Randell to suppress documents and testimony obtained from him in SEC proceeding.
4/12/74	Filed motion of deft Randell for disclosure of prosecutor's instructions to the Grand Jury and of Rec'd of Grand Jury Vote, and for dismissal of the indictment.
4/12/74	Filed memo in support of motion of deft Randell to require disclosure of of Electronic Surveillance.
4/12/74	Filed motion of deft Randell to require disclosure of Electronic surveillance.
4/12/74	Filed memo of law in support of motion of deft Randell for discovery and inspection.

DATE	PROCEEDINGS
4/12/74	Filed memo of law of points and authorities in support of motion of deft Randell for disclosure of Prosecutor's instructions to the Grand Jury and of Rec'd of Grand Jury Vote, and for dismissal of the indictment.
4/12/74	Filed memo of law in support of motion of deft Randell for transfer of venue.
4/12/74	Filed memo of law in support of motion of deft Randell to suppress documents and testimony obtained from him in SEC proceedings.
4/12/74	Filed motion for discovery and inspection by deft Randell.
4/12/74	Filed memo of law in support of motion of deft Randell for bill of particulars.
4/12/74	Filed motion of deft Randell for a bill of particulars.
4/12/74	Filed memo of law ofdeft Randell in support of motion to dismiss for pre-indictment delay.
4/12/74	Filed motion of deft Randell for dismissal for pre-indictment delay.
4/12/74	Filed motion of deft Randell to dismiss count 11ofthe indictment for lack of venue in the SDNY.
4/12/74	Filed memo of law in support of motion of deft Randell to dismiss counts 111 through X11 of the indictment on the ground of duplicity.
4/12/74	Filed motion of deft Randell to dismiss counts 111 through X11 of the indictment on the ground of duplicity.
4/12/74	Filed memo of law in support of motion of deft Randell to dismiss count 11 on the ground of duplicity.
4/12/74	Filed motion of deft Randell to dismiss count 11 on the indictment on the ground of duplicity.
4/12/74	Filed memo of law in support of motion of deft Randell to dismiss the Rule 10b-5 counts of the indictment (The Conspiracy count and substantive counts 111 through X1) on the grounds of vagueness.
4/12/74	Filed motion of deft Randell to dismiss the Rule 10b-5 counts of the indictment (The conspiracy count and substantive counts 111 through X1) on grounds of vagueness.
4/12/74	Filed motion of deft Randell for transfer of venue.
4/12/74	Filed notice of motions of deftsRandell.
4/12/74	Filed defts Natelli and Scansaroli motions for dismissal, severance, copy and inspection, etc. ret: 4/19/74.
4/12/74	Filed defts Natelli and Scansaroli memoor law in support of pre-trial motion made by same.

Cont'd on Page #5

Docket Entries

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DATE	PROCEEDINGS
4/12/74	Filed deft Kelly's notice of motion re: suppress the use of his Grand Jury testimony.
4/12/74	Filed memo oflaw in support of the motion of deft Kelly to suppress the use of his Grand Jury testimony.
4/15/74	Filed deft John G. Davies's motion for severance.
4/15/74	Filed deft John G. Davies's memo of law in support of motion for severance.
4/15/74	Filed deft John G. Davies's motion forchange of venue.
4/15/74	Filed deft John G. Davies's memo of law in support of motion for change of venue.
4/25/74	Filed Govt's affdvt re: response to various motion of the defts.
4/25/74	Filed Govt's memo of law in opposition to defense motions.
5/1/74	Filed Govt's response to Randell's demands for further particulars.
5/2/74	Filed reply memorandum of deft Randell in support of defense motions.
5/2/74	Filed reply memorandum or the defts Natelli and Scansaroli on the joint pre-trial motions.
5/3/74	Filed reply memo of law in support of the motion of deft D. Kelly to suppress the use of his Grand Jury testimony.
5/15/74	Filed reply affdvt of Thomas A. Butler to the affdvt of Harold F. McGuire,Jr., and in further support of the motion of Dennis Kelly to suppress his Grand Jury testimony.
5/21/74	Filed memo of law in support of the joint pre-trial motions of the defts Natelli and Scansaroli.
5/21/74	Filed reply memo of law of the deft Natelli and Scansaroli on the joint pre-trial motions.
5/21/74	Filed Govt's surreply memorandum.
5/21/74	Filed memo of law in support of the motion of deft Dennis M. Kelly to suppress the use of his Grand Jury testimony.
5/21/74	Filed reply memorandum of law in support of the motion of deft Dennis M. Kelly to suppress the use of his Grand Jury testimony.
5/21/74	Filed OPINION # 40725- motions disposed of as follows: Randell and Bushnell's motion to dismiss count 2- denied, Randell's motion to dismiss counts 3 through 12-denied, Randell's motion to dismiss on the ground that SEC Rule 10b-5 is void for vagueness- denied, Randell and Bushnell's motion for particulars-denied, except to the extent indicated. Randell's motion to dismiss counts 3 through 11. due to vagueness- denied, Randell's motion to compel pre-trial discovery of Co-conspirator statements and statements of witnesses whom the Govt does not intend to call at trial-denied. -cont'd on next page- pgs

D. C. 109 Criminal & Bankruptcy Continuation Sheet

Docket Entries

DATE	PROCEEDINGS
5/23/74	Opinion#40725 cont'd- Natelli and Scansaroli's motion to admit polygraph evidence-denied. Randell, Natelli and Scansaroli's motions to comple disclosure of certain portions of the Grand Jury proceedings-denied, Natelli and Scansaroli's motion to inspect Analyses by SEC employees of NSMC Financial Statements-denied, Randell motion to dismiss for pre-indictment delay-denied, Davies, Natelli and Scansaroli's motions for trial severance-denied. Randell and Davies's motions for change of venue-denied, Randell, Natelli and Scansaroli's motions to dismiss count 2 for improper venue-denied, all defts's motion to obtain tapes or transcripts of their conversations-adjourned to later date, Randell's motion to suppress documents and or testimony before the S.E.C.-denied, Kelly motion to suppress Grand Jury testimony-denied. Tyler,J. mn
7/1/74	Robert C. Bushnett (atty. present) withdraws plea of not guilty and pleads guilty to count #11 only. Pre-sentence investigation ordered Sentence adj.'d. sine die. Bail cont'd. Tyler,J.
7/3/74	Filed Govt's bill of particulars.
7/9/74	Filed transcript of record of proceedings, dated 2/22/74
7/12/74	Filed transcript of record of proceedings, dated 1/22/74.
7/15/74	Pretrial conference held. All matters adjourned to 8/23/74 at 2:15 PM. Tyler,J.
7/16/74	Filed transcript of record of proceedings, dated 5/3/74
7/23/74	Filed deft A. Natelli's notice of motion re: severance ret: 8/23/74.
7/23/74	Filed memo. of law in support of the joint motion of defts. Natelli and Scansaroli for a severance.
7/16/74	D. Kelly- memo-end. on application for reduction of sentence. Denied. Tyler,J. mn pro-se.
8-2-74	[illegible] 4-3-74
8/20/74	Defs-Kelly(Atty Thomas Butler Pres.) withdraws plea of not guilty to Count 1 only & now pleads guilty to that count only. P.S.I. ordered. Sentence adj. Sine Die-Bail Cont'd. Tyler J.
8/20-74	Deft. Randell(C.F.Grossi Pres) withdraws plea of not guilty to cts 1 2 8 & 11 and now pleads guilty to cts 1 2 8 & 11. P.S.I. ordered. Sentence adj. Sine Die. Bail cont'd. Tyler.J.
8/23/74	Deft's Natelli & Scansaroli-Filed memo endorsed on motion filed 7-23-74 Motion granted on consent of the prosecution. So ordered. Tyler.J.
9/6/74	Filed Govt 's affdvt. re: response to the motion to sever filed on behalf of defts Natelli and Scansaroli.

F -cont'd on next page-

Docket Entries

74.Cr. 43. Judge Tyler

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order or Judgment Not
9/9/74	Filed order that the provisions of bail previously set for the deft. Robert Bushnell be extended so as to allow his to travel to and from Bermuda for the purpose of attending a business convention during the period from 9/7/74 to 9/16/74. Conner,J. mn	
9/17/74	Filed transcript of record of proceed[illegible] 7/15/74	
0/4/74	Filed Govt.'s trial memorandum.	
0/9/74	Filed memo. of law in support of deft. Scansaroli's motion for a severance or the exclusion of certain evidence from the Govt.'s case.	
0/9/74	Filed pretrial memorandum of the defts. Natelli and Scansaroli.	
0/9/74	Filed defts.' proposed examiration of prospective jurors.	
9/16-74	A. Morton-- Filed papers origionally, filed with Magistrate Raby: (1) Docket Entry Sheet (2) Criminal Complaint, S.D.N.Y. (3) Disposition Sheet (4) Appointments of Counsel (5) Notices of Appearance	
0/17/74	Filed Govt.'s proposed examination of prospective jurors.(copy)	
0/17/74	Filed Govt.'s memo. of law in opposition to defts' motion to preclude proof.(copy)	
0/17/74	Filed Govt.'s memo. of law re: the Grand Jury testimony of Natelli and Scansaroli is admissible. (copy)	
0/18/74	Filed Govt's memo. of law in opposition to Scansaroli's motion for severance.	
0/21/74	Filed defts.' reply memorandum of law, re: Govt.'s memo. of law.	
0/21/74	Trial begun as to count 2 with a jury, before Judge Tyler.	
0/22/74	Trial cont'd.	
0/23/74	Trial cont'd.	
0/24/74	Trial cont'd and adjourned to 10/29/74.	
0/29/74	Trial cont'd.	
0/30/74	Trial cont'd.	
0/31/74	Trial cont'd.	
1/1/74	Trial cont'd.	

-Over-

DATE	PROCEEDINGS	Date Ord Judgment
11/4/74	Trial cont'd.	
11/5/74	Trial cont'd.	
11/6/74	Trial cont'd.	
11/7/74	Trial cont'd.	
11/8/74	Trial cont'd. and adjourned to 11/11/74. Tyler,J.	
11/12/74	Filed transcript of record of proceedings, dated 8/20/74	
11/18/74	Filed defts.' joint memorandum on the order of summations.	
11/18/74	Filed Govt.'s offer of proof.	
11/18/74	Filed deft. Natelli's memo. of law in support of motion for judgment of acquittal.	
11/18/74	Filed memo. of defts.Natelli and Scansaroli in support of motion to dismiss the indictment.	
11/18/74	Filed memo. of law in support of defts.' objection to the Govt.'s use of any expert testimony or lay textimony on the issue of materiality.	
11/18/74	Filed deft. Scansaroli's requests to charge.	
11/18/74	Filed deft. Scansaroli's suppl. requests to charge.	
11/18/74	Filed Govt.'s requests to charge.	
11/18/74	Filed Govt.'s suppl. requests to charge.	
11/18/74	Filed Govt.'s suppl.requests to charge No. 2.	
11/18/74	Filed deft. Natelli's contentions.	
11/18/74	Filed deft. Scansaroli's requests to charge.	
11/18/74	Filed defts. Natelli's requests to charge.	
11/18/74	Filed memo. of law in support of defts.' objection to the Govt.'s use of any expert testimony of lay testimony on the issue of materiality.	
11/18/74	Filed Govt.'s memo. testimony of fraud victim witness.	
11/18/74	Filed defts. reply memorandum.	
11/18/74	Filed Govt.'s memo. of law in opposition to Scansaroli's motion for severance.	
11/18/74	Filed Govt.'s proposed examination of prospective jurors.	

-cont'd on next page-

DATE	PROCEEDINGS
11/18/74	Filed Govt.'s memo. in opposition to defts.' motion to preclude. proof.
11/18/74	Filed Govt.'s memo. the Grand Jury testimony of Natelli and Scansaroli is admissible.
11/11/74	Trial cont'd.
11/12/74	Trial cont'd.
11/13/74	Trial cont'd.
11/14/74	Trial cont'd. and concluded. Defts. Natelli & Scansaroli - guilty on count 2. Sentences set for 12/27/74. Motions ret: 12/20/74. Deft. cont'd. on bail to sentence. Tyler,J.
11/26/74	Filed transcript of record of proceedings, dated Aug 20, 1974.
11/26/74	Filed transcript of record of proceedings, dated Aug 23, 1974.
11/22/74	Bernard Kurek- sentence adjourned on consent of AUSA to 1/10/75. Tyler,J.
12/11/74	Filed memo. of law in support of deft. Natelli's motion for a judgment of Acquittal or, in the alternative, for a new trial.
12/13/74	Filed deft. Scansaroli's motion for a judgment of acquittal or for a new trial.
12/10/74	Filed Govt's memorandum in opposition to post trial motions.
12/13-74	Filed transcript of record of proceedings, dated 6/11/74
12-19-74	Filed deft's J.Scansaroli reply memorandum, in support of motion for a judgment of acquittal or a new trial.
12/30/74	Filed memo. submitted by Dennis M. Kelly with respect to sentencing.
12/27/74	Filed deft. Anthony M. Natelli's notice of appeal from judgment of convication entered 12/27/74. Miled copies.
12/27/74	ROBERT C. BUSHNELL-(atty. present) Filed JUDGMENT - deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of SIX (6) MONTHS on count 11. execution of sentence is hereby suspended and the deft. is placed on probation for a period of TWO (2) YEARS. Subject to the standing probation order of this court. Committed fine of $4,000. to be paid during the term of deft.'s probation. Counts 1,2,3,4,5,6,7,8,9,10 and 11 are dismissed on motion of the deft.'s counsel with consent of the Govt. Tyler,J. Issued copies ent. 12/27/74

D. C. Jail Criminal Continuation Sheet

Docket Entries

DATE	PROCEEDINGS
	#75 005
12/27/74	DENNIS M. KELLY (atty. present) filed JUDGMENT - deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of TEN (10) MONTHS on count 1. Committed fine of $10,000. on count 1 to be paid by 4/1/75. Deft. to surrender at ALLENWOOD CORRECTIONAL INSTITUTION before 12 noon 1/21/75. Counts 2-11, and 14 are dismissed on motion of the deft.'s counsel with the consent of the Govt. Tyler,J. issued copies. ent. 1/2/75
12/31/74	Joseph Scansaroli filed notice of appeal from judgment of conviction. mailed copies.
	#75 006
12/27/74	JOSEPH SCANSAROLI- filed Judgment-deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of ONE (1) YEAR pursuant to Sec. 3651 of T. 18,U.S. Code the deft. is confined in a jail type institution for a period of TEN (10) DAYS. Execution of the remainder of the sentence is suspended and the deft. is placed on probation for a period of ELEVEN (11) MONTHS and TWENTY (20) DAYS to commence upon expiration of confinement, subject to the standing probation order of the Court. Committed fine on count 2 of $2,500. to be paid during the term of deft.'s probation. Tyler,J. issued copies ent. 1/2/75
	#75 007
12/27/74	ANTHONY. M. NATELLI-filed Judgement -deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of ONE (1) YEAR pursuant to Sec. 3651 of T. 18,U.S. Code. the deft. is confined in a jail type institution for a period of SIXTY (60) DAYS. Execution of the remainder of the sentence is suspended and deft. is placed on probation for a period of TEN (10) MONTHS to commence upon expiration of confinement, subject to the standing probation order of this Court. Committed fine of $10,000. on count2 to be paid within 60 days. Tyler,J. issued copies. ent. 1/2/75
1/2/75	C. Randell- filed presentence memorandum.
1/2/75	Filed transcript of record of proceedings,dated Oct.21,22,23,24,25,1974.
1/2/75	Filed trancript of record of proceedings, dated Oct.30,31 Nov.1,4,5,197.
1/2/75	Filed trancript of record of proceedings, dated Nov. 6,7,8,11,12,1974.
1/2/75	Filed transcript of record of proceedings, dated Nov.13,14,1974.
1/2/75	Filed transcript of record of proceedings,dated 12/27/74 (Randell,Kelly Bushrell.
1/2/75	Filed transcript of record of proceedings, dated 12/27/74(Natelli,Scans
1/2/75	Filed transcript of record of proceedings,dated 12/27/74(Natelli,Scansa
	#75 004
12/27/74	CORTES W. RANDELL-(atty. present) filed JUDGMENT-that the deft. is comm to the custody of the Atty. Gen'l. for imprisonment for a period EIGHTEEN (18) MONTHS cncounts 1,2 and 8 to run concurrently. The of sentence on count 11 is hereby suspended and the deft. is plac on probation for a period of THREE (3) years without super ion. Cts.1,2 & 8 $10,000 fine each count. Total fine $40,000. to [illegible] by 2/1/75. Counts 3-7,9 & 12 are dismissed. Tyler,J. [illegible] ent. 1/3/75.

DATE	PROCEEDINGS
1/7/75	Filed Affidavit of Harold F. McGuire, Jr., dated May 10-74, in response to certain allegations in a motion in this case made by the defendant Dennis Kelly.
1/7/75	Filed Affidavit of Franklin B. Velie, Assist. U.S. Attorney, dated May 3-74, in response to reply memorandum submitted by defendants in support of various motions.
1/7/75	Filed Memorandum, received on Dec. 10-74, in support of defendant Natell's motion for a judgment of acquittal or, in the alternative, for a new trial.
1/7/75	Filed Memorandum , received on Dec. 13-74, in support of motion for a judgment of acquittal or for a new trial.
1/7/75	Filed Reply Memorandum, received on December 19-74, of Joseph Scansaroli.
1/8/75	Filed transcript of record of proceedings dtd:Nov. 5-8-74.
1/8/75	Filed transcript of record of proceedings dtd:Dec. 20-74.
1/14/75	Filed Request no. 8-Responsibility of Auditors. (Copy received on Nov. 11-74 by U.S. Atty.)

K

INDICTMENT

HFM,Jr.:wp

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

- v - :

CORTES W. RANDELL, ROBERT C. BUSHNELL, JOHN G. DAVIES, DENNIS M. KELLY, BERNARD J. KUREK, ANTHONY M. NATELLI and JOSEPH SCANSAROLI, :

Defendants. :

- x

74 CRIM. 43

INDICTMENT

74 Cr.

U.S. DISTRICT COURT FILED JAN 17 1974 S.D. OF N.Y.

MICROFILM JAN 18 1974

INTRODUCTION

The Grand Jury charges:

1. At all relevant times, National Student Marketing Corporation ("NSMC") maintained offices in the Southern District of New York and at other places, and engaged in the business of marketing goods and services to young people on college campuses and elsewhere.

2. In approximately April, 1968, NSMC registered 200,000 shares of its own stock for sale with the United States Securities and Exchange Commission ("SEC") and sold that stock to members of the public; thereafter, at all relevant times, there existed in New York, New York,

and elsewhere a public over-the-counter market for NSMC common stock. At no relevant time did the registered and publicly traded stock of NSMC constitute more than a small portion of the total number of shares of NSMC common stock issued and outstanding.

3. At all relevant times, defendant CORTES W. RANDELL was the president and chief executive officer of NSMC and its largest single shareholder.

4. Beginning in approximately February, 1968, defendants ROBERT C. BUSHNELL and DENNIS M. KELLY were salesmen associated with NSMC; beginning in December, 1968, and at all relevant times thereafter, defendants ROBERT C. BUSHNELL and DENNIS M. KELLY were salaried employees and officers of NSMC.

5. Beginning in approximately December, 1968, and at all relevant times thereafter, defendant JOHN G. DAVIES, an attorney, was an employee of NSMC and its principal legal officer.

6. Beginning in approximately June, 1968 and at all relevant times thereafter, defendant BERNARD J. KUREK was an employee of NSMC and its chief accounting officer.

7. At all relevant times defendant ANTHONY

M. NATELLI, a certified public accountant, was the partner in charge of the Washington, D. C., office of Peat, Marwick, Mitchell & Co., a public accounting firm; beginning in approximately August, 1968 and all relevant times thereafter, defendant ANTHONY M. NATELLI was the principal outside auditor of the financial statements of NSMC.

8. From approximately August, 1968 until approximately mid October, 1969, defendant JOSEPH SCANSAROLI, a certified public accountant, was an employee of Peat, Marwick, Michell & Co., assigned to act as audit supervisor for NSMC; beginning in mid October, 1969 and at all relevant times thereafter, defendant JOSEPH SCANSAROLI was an employee of NSMC.

9. This Introduction is hereby incorporated and realleged in each count of this Indictment as if set forth fully therein.

COUNT ONE

The Grand Jury further charges:

1. From on or about January 1, 1968, up to and including September 1, 1970, in the Southern District of New York and elsewhere, CORTES W. RANDELL, ROBERT C. BUSHNELL, DENNIS M. KELLY, BERNARD J. KUREK and JOHN G. DAVIES, the defendants, unlawfully, wilfully and knowingly

did combine, conspire, confederate and agree among each other and with James F. Joy, Juan Homs, Thomas E. Mullen, Ronald Michaels and others known and unknown to the Grand Jury, to commit offenses against the United States, to wit, violations of Title 18, United States Code, Sections 1341 and 1343, and Title 15, United States Code, Sections 77q(a), 77x, 78j(b) (including Rule 10b-5 promulgated by the SEC thereunder), 78n (including Rules 14a-6 and 14a-9 promulgated by the SEC thereunder) 78o(d) (including Rule 15d-1 promulgated by the SEC thereunder) and 78ff.

2. It was a part of the conspiracy that the said defendants and co-conspirators would,in the offer and sale of the common stock of NSMC by the use of means and instruments of transportation and communication in inter-state commerce and by the use of the mails, directly and indirectly (a) employ devices, schemes, and artifices to defraud purchasers of NSMC stock; (b) obtain money and property by means of statements as to the business activities, sales, earnings and prospects of NSMC which contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (c) engage in transactions, practices and

courses of business which would and did operate as a fraud and deceit upon purchasers of NSMC stock.

3. It was further a part of the conspiracy that the defendants and their co-conspirators would devise schemes and artifices to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and for the purpose of executing said schemes and artifices and attempting so to do, would transmit telephone conversations in interstate commerce and use the mails.

4. It was further a part of the conspiracy that the defendants and their co-conspirators would make false and misleading statements as to material facts in a Form 10-K annual report for NSMC for the fiscal year ended August 31, 1968 and in a proxy statement for NSMC dated September 27, 1969, which were required to be filed with the SEC under the provisions of Title 17, Code of Federal Regulations, Sections 240.15d-1 and 240.14a-6.

5. Among the means which the defendants and their co-conspirators would and did use to carry out the aforesaid conspiracy were the following:

(a) Beginning in March, 1968, the defendants devised and practiced a fraudulent scheme for

recording income and assets on the financial statements of NSMC with respect to "contracts in progress", which income and assets, as they well knew, were in large part nonexistent.

(b) From approximately July, 1968 through January, 1970, defendant CORTES W. RANDELL attempted to induce, and did induce financial institutions, private investors and the shareholders of corporations which NSMC proposed to acquire, to accept NSMC common stock in exchange for money, property and securities on the strength of reports as to NSMC's sales, earnings and future prospects which he knew to be materially false and misleading.

(c) Beginning in November and December, 1968, defendant CORTES W. RANDELL caused to be mailed to shareholders of NSMC, and to be filed with the SEC, and to be distributed to prospective buyers of NSMC stock, an annual report of NSMC for the fiscal year ended August 31, 1968, containing financial statements which were materially false and misleading as to sales and earnings, as defendants CORTES W. RANDELL, ROBERT C. BUSHNELL and DENNIS M. KELLY then and there well knew.

(d) In or about May, 1969, defendants CORTES W. RANDELL and BERNARD J. KUREK caused to be mailed to NSMC shareholders, and distributed to the public, an earnings report for the six-month period ended February 28, 1969, which was materially false and misleading, as defendants CORTES W. RANDELL, ROBERT C. BUSHNELL, DENNIS M. KELLY and BERNARD J. KUREK then and there well knew.

(e) From approximately July 25 through August 15, 1969, defendants CORTES W. RANDELL, ROBERT C. BUSNELL, DENNIS M. KELLY and BERNARD J. KUREK knowingly caused false and misleading representations as to the sales and earnings of NSMC for the nine months ended May 31, 1969, to be transmitted by mail and by telephone, among other means, from New York City to Chicago, Illinois, for the purpose of fraudulently inducing the directors of Interstate National Corporation to sign an agreement to merge with NSMC.

(f) On or about September 27, 1969, defendants CORTES W. RANDELL, ROBERT C. BUSHNELL, DENNIS M. KELLY, BERNARD J. KUREK and JOHN G. DAVIES knowingly caused to be

mailed to shareholders of NSMC and representatives of Interstate National Corporation, and to be filed with the SEC and distributed to prospective buyers of NSMC stock, a proxy statement which they knew contained materially false statements of the sales, earnings and assets of NSMC for the fiscal year ended August 31, 1968 and for the nine-month period ended May 31, 1969.

(g) Between October 1, 1969 and December 30, 1969, in connection with the sale of more than 2,000,000 shares of NSMC common stock, defendants CORTES W. RANDELL, ROBERT C. BUSHNELL, DENNIS M. KELLY, BERNARD J. KUREK and JOHN G. DAVIES knowingly omitted to state, among other things, the following material facts which were necessary to make the statements, representations, speeches and press releases that they had made, in the light of the circumstances under which they were made, not misleading:

(i) that NSMC's internal youth marketing division had operated at a loss during the fiscal year ending August 31, 1969 and was being substantially disbanded;

(ii) that projections and reports of substantial NSMC earnings for the fiscal year ending August 31, 1969 were based in major part on the "pooling" of the earnings of other companies acquired by NSMC after the end of that fiscal year;

(iii) that earlier favorable reports as to NSMC's sales and earnings had been based in major part on alleged income from "contracts in progress" which were in fact largely non-existent; and

(iv) that material unfavorable accounting adjustments had been retroactively made to NSMC's publicly reported sales and earnings figures for the fiscal year ended August 31, 1968 and the nine-month period ended May 31, 1969.

(h) From April, 1968 through December, 1969, defendants CORTES W. RANDELL, ROBERT C. BUSHNELL, DENNIS M. KELLY, BERNARD J. KUREK and JOHN G. DAVIES caused the quoted prices of NSMC stock on the over-the-counter market to rise from an original offering price of $6 per share in April, 1968 to

the artificially high level of more than $70 per share (after a 2-for-1 stock split) in December, 1969.

(i) From time to time during the year 1969, defendants CORTES W. RANDELL, ROBERT C. BUSHNELL and DENNIS M. KELLY sold substantial quantities of NSMC stock which they owned, at profits aggregating more than $3 million for defendant RANDELL and more than $50,000 each for defendants BUSHNELL and KELLY.

(j) Defendants CORTES W. RANDELL, ROBERT C. BUSHNELL, DENNIS M. KELLY, BERNARD J. KUREK and JOHN G. DAVIES directly and indirectly caused purchasers of NSMC stock to be defrauded of many millions of dollars in money and property during the period from January 1, 1968 through September 1, 1970.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the defendants did commit the following overt acts in the Southern District of New York:

1. In or about May, 1969, defendant CORTES W. RANDELL forged a letter which purported to be a commitment to NSMC by the Pontiac division of General Motors Corp. to purchase services for $1,200,000.

2. On or about August 14, 1969, defendant BERNARD J. KUREK read a false financial statement over the telephone to a representative of Interstate National Corporation in Chicago, Illinois.

3. On or about August 15, 1969, defendant DENNIS M. KELLY delivered a fraudulent letter signed by co-conspirator Thomas E. Mullen which purported to be a commitment to NSMC by Eastern Airlines to purchase services for $820,000.

4. In or about September and October, 1969, defendant ROBERT C. BUSHNELL delivered to co-conspirator Juan Homs, an employee of American Airlines, payment in the form of a gold paperweight and 800 shares of NSMC stock in return for a fraudulent letter which purported to be a commitment to NSMC by American Airlines to purchase services for $534,000.

5. On or about October 31, 1969, defendants CORTES W. RANDELL and JOHN G. DAVIES attended a meeting to consummate the merger of NSMC with Interstate National Corporation.

6. On or about December 11, 1969, defendant CORTES

W. RANDELL sold 22,000 shares of NSMC stock for more than $1,300,000.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

1. On or about September 27, 1969, in the Southern District of New York, defendants CORTES W. RANDELL, ROBERT C. BUSHNELL, DENNIS M. KELLY and BERNARD J. KUREK, as responsible officers of NSMC, and ANTHONY M. NATELLI and JOSEPH SCANSAROLI, as independent auditors of NSMC, unlawfully, wilfully and knowingly made and caused to be made false and misleading statements with respect to material facts as set forth in paragraphs 3 and 4 of this Count in a proxy statement for NSMC dated September 27, 1969.

2. Said proxy statement solicited approval by the NSMC shareholders of the issuance of additional shares of NSMC common stock and the approval of certain mergers, and was required to be filed and was filed with the SEC pursuant to Title 15, United States Code, Section 78 n(a) and Rule 14a-6(c) promulgated by the SEC thereunder.

3. Said proxy statement contained an "audited" statement of earnings for NSMC for the fiscal year ending August 31, 1968, which differed from a previous "audited" statement of earnings for the same period contained in an annual report to stockholders for that fiscal year. The difference was explained in the following footnote:

> "Net sales and earnings as originally reported to stockholders in the annual report [for the year 1968] and the amounts as shown in the statement of earnings in this proxy statement are reconciled as follows:
>
> Net sales
>
> | | |
> |---|---|
> | Originally reported | $ 4,989,446 |
> | Pooled companies reflected retroactively | $ 6,552,449 |
> | Per statement of earnings | $11,541,895 |
>
> Net earnings
>
> | | |
> |---|---|
> | Originally reported | $ 388,031 |
> | Pooled companies reflected retroactively | $ 385,121 |
> | Per statement of earnings | $ 773,152 " |

This explanatory note was materially false and misleading in the light of the circumstances under which it was made because, as the defendants well knew but failed to disclose, among other things: (a) approximately one million dollars, or more than 20% of the 1968 "net sales originally reported" had proven to be nonexistent by the time the proxy statement was filed and had been written off on NSMC's own internal

books of account; (b) net sales and profits of "pooled companies reflected retroactively" were substantially understated; and (c) net sales and profits of NSMC were substantially overstated.

4. Said proxy statement also contained an "unaudited" statement of earnings for the nine months ended May 31, 1969 which stated "net sales" as $11,313,569 and "net earnings" as $702,270. These figures were materially false and misleading because, as the defendants well knew at the time the proxy statement was filed, "net sales" for that period were less than $10,500,000 and NSMC had no earnings at all.

(Title 15, United States Code, Sections 78ff, 78n; Title 18, United States Code, Section 2.)

COUNTS THREE THROUGH ELEVEN

The Grand Jury further charges:

1. On or about the dates set forth in Counts Three through Eleven below, in the Southern District of New York, defendants CORTES W. RANDELL, ROBERT C. BUSHNELL, DENNIS M. KELLY, BERNARD J. KUREK and JOHN G. DAVIES did unlawfully, wilfully and knowingly, directly and indirectly, by use of means and instrumentalities of interstate commerce and of the mails, use and employ manipulative and deceptive devices and contrivances in connection with the sale of

securities by NSMC, to wit, NSMC common stock, in violation of Rule 10b-5 (Title 17, Code of Federal Regulations, Section 240.10b-5), a rule prescribed by the SEC as necessary and appropriate in the public interest and for the protection of investors.

2. The allegations of paragraph 5 of Count One of this Indictment are repeated and realleged as constituting and describing some of the means by which said defendants committed the offenses described in paragraph 1 of these counts.

3. On or about the dates hereinafter set forth in Counts Three through Eleven, in the Southern District of New York, defendants CORTES W. RANDELL, ROBERT C. BUSHNELL, DENNIS M. KELLY, BERNARD J. KUREK, and JOHN G. DAVIES did unlawfully, wilfully and knowingly use and cause to be used means and instrumentalities of interstate commerce and the mails in connection with sales of quantities of NSMC stock to purchasers as shown below:

COUNT	DATE	PURCHASERS OF NSMC STOCK	NO. OF SHARES PURCHASED
3	October 9, 1969	Stockholders of Five-Dollar-a-Day Tours, Inc., and Frommer-Pasmantier Publishing Corp.	125,581
4	October 14, 1969	Stockholders of Mailbag International, Inc., and M.I.I. Services, Inc.	90,434

COUNT	DATE	PURCHASERS OF NSMC STOCK	NO. OF SHARES PURCHASED
5	October 17, 1969	Stockholders of Mar-Clay Mills, Inc.	160,000
6	October 29, 1969	Stockholders of Varsity House, Inc.	138,801
7	October 29, 1969	Stockholders of W.R. Simmons & Associates Research, Inc.	240,000
8	October 31, 1969	Stockholders of Interstate National Corporation	826,666
9	November 13, 1969	Stockholders of Ritzenthaler Bus Lines, Inc. and affiliated companies	103,846
10	November 13, 1969	Stockholders of Cottrell Bus Service, Inc. and Clintcott, Inc.	70,121
11	November 13, 1969	Stockholders of Stuckey & Speer, Inc.	137,506

(Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5; Title 18, United States Code, Section 2.)

COUNT TWELVE

The Grand Jury further charges:

1. On or about December 11, 1969, in the Southern District of New York, CORTES W. RANDELL, the defendant, in the offer and sale of securities, to wit, 22,000 shares of NSMC common stock, by the use of means and instruments of transportation and communications in

interstate commerce and by the use of the mails, did directly and indirectly, unlawfully, wilfully and knowingly (a) employ a scheme and artifice to defraud, (b) obtain money and property by means of untrue statements of material facts and by omitting to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, and (c) engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon Enterprise Fund, Inc., and IDS New Dimensions Fund, Inc., the purchasers of said securities.

2. In committing the said offense, CORTES W. RANDELL, the defendant, employed, among other means, the means set forth in Paragraph 5 of Count One of this Indictment, which is hereby incorporated by reference as if fully set forth herein.

(Title 15, United States Code, Sections 77q(a) and 77x.)

COUNT THIRTEEN

The Grand Jury further charges:

1. On or about December 19, 1969, in the Southern District of New York, ROBERT C. BUSHNELL, the defendant, in the offer and sale of securities, to wit, 1,000 shares of NSMC common stock, by the use of means of instruments of transportation and communication in interstate commerce and by use of the mails, did directly and indirectly, unlawfully wilfully and knowingly (a) employ a scheme and artifice to defraud, (b) obtain money and property by means of untrue statements of material facts and by omitting to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, and (c) engage in transactions, practices, and courses of business which would and did operate as a fraud and deceit upon pension funds, trust funds and institutional investors which purchased said securities.

2. In committing the said offense, ROBERT C. BUSHNELL, the defendant, employed, among other means, the means set forth in Paragraph 5 of Count 1 of this

Indictment, which is hereby incorporated by reference as if fully set forth herein.

(Title 15, United States Code, Sections 77q(a) and 77x.)

COUNT FOURTEEN

The Grand Jury further charges:

1. On or about December 19, 1969, DENNIS M. KELLY, the defendant, in the offer and sale of securities, to wit, 1,500 shares of NSMC common stock, by the use of means and instruments of transportation and communication in interstate commerce and by the use of the mails, did directly and indirectly, unlawfully, wilfully, and knowingly (a) employ a scheme and artifice to defraud, (b) obtain money and property by means of untrue statements of material facts and by omitting to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, and (c) engage in transactions, practices, and courses of business which would and did operate as a fraud and deceit upon pension funds, trust funds and institutional investors which purchased said securities.

2. In committing the said offense, DENNIS M. KELLY, the defendant, employed, among other means, the

means set forth in Paragraph 5 of Count One of this Indictment, which is hereby incorporated by reference as if fully set forth herein.

(Title 15, United States Code, Sections 77q(a) and 77x.)

Richard Eldridge
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By M. Grunwald
Deputy Clerk

A 32

Indictment

Dec. 27 1974 Deft Cortes Randell present & atty Jessie Grasso present 18 months on Count 1, 2 and 8 to run concurrently. Count 1 execution of sentence is suspended and Deft placed on 3 years unsupervised probation. Committed fine of $10,000 on each of counts 1, 2 and 8 for a total committed fine of $30,000 to be paid by April 1, 1975. Deft to surrender at Allenwood Correctional Institution by 12 noon January 13, 1975.

[illegible]

A 33

Indictment

November 22, 1974 — Bernard J. Kurek (Deft's counsel: Plato Cacheris present)
Sentence adjourned on consent of AUSA Velie to Jan. 10, 1975.

Tyler J.

Dec 27 1974 A.U.S.A Velie present. Deft Joseph Scarsavelli present Deft atty Charles Stillman present. 1 year pursuant to Section 3651 U.S.C title 18. the Defendant is confined to a jail type institution for a period of 10 days. Execution of sentence is suspended and the Deft is placed on probation for a period of one year. Committed fine of 2500 to be paid during term of probation. Deft is continued on present bail pending appeal.

Deft. Anthony Natille present atty John Nolan present 1 year pursuant to Section 3651 title 18. U.S.C. Deft is confined to a jail type institution for a period of 60 days. Execution of sentence is suspended and the Deft placed on probation for a period of 1 yrs. Committed fine of $10,000 to be paid within 60 days. Deft is continued on present bail pending appeal.

Deft. Robert Rushell present atty Andrew Lauber present 6 month on count 11 execution of sentence is suspended and Deft placed on probation for a period of 5 years. Committed fine of $4000 to be paid during the term of Deft probation. Count 1, 2, 3, 4, 5, 6, 7, 8, 9, 12 and 13 dismissed

Deft Dennis Kelly present atty Thomas Buttel present 10 months on Count 1. Committed fine of $10,000 to be paid by April 1. 1975. Deft to surrender at Allenwood Confined Institution before 12 noon Jan 22, 1975 Count 2, 3, 4, 5, 6, 7, 8, 9 10 and 11. Dismissed.

Indictment

AUSA F. VELIE

AUG 20 1974 DEFT (CATH THOMAS BUTLER PRES.) KELLY WITHDRAWS PLEA OF NOT GUILTY TO COUNT 1 ONLY, AND NOW PLEADS GUILTY TO THAT COUNT ONLY. P.S.I. ORDERED - SENTENCE ADT'D. SINE DIE. BAIL CONT'D. J. TYLER, J.

AUG 20 1974 DEFT (CATH FRANCIS GROSSI PRES) RANDELL WITHDRAWS PLEA OF NOT GUILTY TO CTS 1, 2, 8 AND 11 AND NOW PLEADS GUILTY TO CTS 1, 2, 8 AND 11. P.S.I. ORDERED. SENT. ADT'D SINE DIE. BAIL CONT'D. J. TYLER, J.

Oct. 21, 1974 - Trial Begun (Count 2) Jury selected. Opening statement by Plff.

Oct. 22, 1974 - Trial Continued - Opening statement by Mr Nesbitt for Deft Natelli + Mr. Stillman for Mr. Scansarole.

Oct. 23, 1974 - Trial Continued -

Oct. 24, 1974 - Trial Continued and adjourned to October 29, 1974.

Oct. 29, 1974 - Trial Continued -

Oct. 29, 1974 - Trial Continued -

Oct. 30, 1974 - Trial Continued

Oct. 31, 1974 - Trial Continued

Nov. 1, 1974 - TRIAL CONTINUED -

Nov. 4, 1974 - TRIAL CONTINUED -

Nov. 5 1974 - Trial Continued - Motions -

Nov. 6, 1974 - Trial Continued -

Nov. 7, 1974 - Trial Continued

Nov. 8, 1974 - Trial Continued

Nov. 11, 1974 - Trial Continued

Nov. 12, 1974 - Trial Continued Summations by defts Natelli + Scansarole -

Nov. 13, 1974 - Trial Continued. Summations by Govt. ~~Deft Scansarole~~, Judge charges jury, Jury deliberating -

Nov. 14, 1974 - Trial Cont'd Jury deliberating - Verdict Natelli + Scansarole - Guilty on Cts #2 Sentencing set for Dec 27, 1974, Motions returned by Defts CONTINUED ON BAIL TO SENTENCE. Dec 20, 1974 TYLER

A 35

Indictment

1/31/74 Deft. John G. Davies - no appearance B/W issued.

1-31-74 - DEFT. JOHN G DAVIES (ATTY JAMES J. BIERBOWER. PRES Brient J.
DEFT. PLEADS NOT GUILTY. DEFT. TO BE FINGERPRINTED & PHOTOGRAPHED. BAIL STATUS - $25.000 P.R.B SECURED BY $2,500 CASH OR SURETY. DEFT. TO POST BAIL BY FEB 1, 19[illegible] AT 4 P.M. Tyler. J.

2-1-74 - HEARING (ALL ATTY PRESENT) MOTIONS TO BE FILED NO LATER THAN APRIL 1, 1974, DEFT. BUSHNELL, NO BAIL STATUS - $50.000 P.R.B. SECURED BY $2.500 CASH SURETY. DEFT. TO POST BAIL BY FEB. 5, 1974, NOON - Tyler. J.

APR 3 - 1974 Deft. Bernard J. Kurek (Marvin Segal By: Plato Cacheris) Withdraws plea of not guilty and pleads GUILTY to count # 2 only. Pre-sentence investigation ordered. Sentence adjourned sine die. Deft. continued on present bail to time of sentence. Tyler J.

JUL 1 - 1974 Robert C. Buchnell — {Atty: Andrew Law AUSA: Velie Withdraws plea of not guilty and pleads guilty to count # 11 only. Pre-sentence investigate ordered. Sentence adjourned sine die. Bail continued. Tyler, J.

JUL 15 1974 — Pretrial conference held. All matters adjourned to August 23 at 2:15 pm. Tyler J.

Indictment

74 CRIM. 43 JUDGE TYLER

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

CORTES W. RANDELL, ROBERT C. BUSHNELL, JOHN G. DAVIES, DENNIS M. KELLY, BERNARD J. KUREK, ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Defendants.

INDICTMENT

(18 U.S.C. §§371 & 2; 15 U.S.C §§77q(a), 77x, 78ff, 78j(b); 17 C.F.R. §240.10b-5)

PAUL J. CURRAN
United States Attorney

A TRUE BILL

Richard Edwards
Foreman

U.S. DISTRICT COURT FILED JAN 17 1974 S.D. OF N.Y.

1/28/74 Cortes W. Randell (atty. Robert Weisberg) present. Pleads Not Guilty. Bail fixed at $200,000 P.R.B. secured by $50,000 cash or surety and co-signed by wife. Bail to be posted by 2/1/74. Limits extended to work areas and residence.

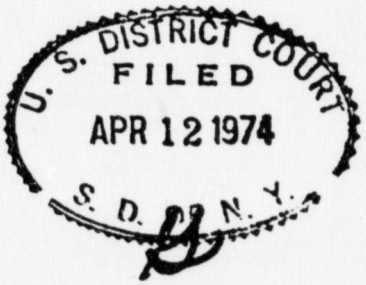
Robert C. Bushnell (atty Thomas Butler) present. Pleads Not Guilty. Bail fixed at $50,000 P.R.B. secured by $5,000 cash or surety. Bail to be posted by 2/1/74. Bail limits extended to work areas and residence.

John G. Davies - not present. atty. James Beerbauer present. Court enters Not Guilty plea. B/W ordered but stayed until 1/31/74.

Dennis M. Kelly (atty. Thomas Butler) present. Pleads Not Guilty. Bail fixed $50,000 P.R.B. secured by $1,000 cash or surety. Bail to be posted by 2/1/74. Bail limits extended to work areas and residence.

Bernard J. Kurek (atty Eugene Siegel)
Anthony J. Natelli (atty John S. Martin)
Joseph Scansaroli (Charles Stillman)
Defts. Plead not guilty.
Bail fixed $50,000 Unsecured P.R.B.
Bail limits extended to Continental U.S.

NOTICE OF MOTION OF DEFENDANTS NATELLI AND SCANSAROLI



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

- against -

CORTES W. RANDELL, ROBERT C. BUSHNELL, JOHN G. DAVIES, DENNIS M. KELLY, BERNARD J. KUREK, ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Defendants.

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74 Cr. 43 (HRT)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the indictment herein and the annexed affidavits of Leon P. Otkiss, sworn to the 27th day of March, 1974, John T. Johnston, sworn to the 27th day of March, 1974, William C. Colona, Jr., sworn to the 26th day of March, 1974, Douglas H. Oberlander, sworn to the 25th day of March, 1974, Walter Hanson, sworn to the 9th day of April, and Richard O. Arther, sworn to the 12th day of April, 1974, the undersigned will move this court in Room 128 of the United States Courthouse, Foley Square, New York, New York 10007 on the 19th day of April,

1974 at 2:15 p.m. or as soon thereafter as counsel can be heard, for the following relief:

1. Pursuant to Rules 12 and 18, F.R.Crim.P., for an order dismissing Count 2 of the indictment on the ground that the offense alleged in that Count was not committed in this district;

2. Pursuant to Rules 8(b) and 14, F.R.Crim.P., for an order severing the trial of Count 2 from the trial of the other defendants on the other counts of this indictment;

3. Pursuant to Rules 6(e) and 16(b), F.R.Crim,P., for an order permitting the defendants Natelli and Scansaroli to inspect and copy the grand jury testimony of Leon P. Otkiss, John T. Johnston, William C. Colona, Jr. and Douglas H. Oberlander, each of whom joins in this application;

4. Pursuant to Rule 16(b), F.R.Crim.P., for an order requiring the Government to make available to the defendants for inspection and copying all files, notes, correspondence or memoranda of the Securities and Exchange Commission prepared prior to January 1, 1970 reflecting or constituting any discussions, analysis, opinions or comments relating to any financial statements submitted to or filed with the Securities and Exchange Commission by National Student Marketing Corporation or any evaluation of such submission; and

5. Pursuant to Rule 28(a), F.R.Crim.P., for an order

appointing a polygraph expert to administer a polygraph test to the defendants Natelli and Scansaroli.

Dated: New York, New York
April 12, 1974

Yours, etc.,

MARTIN & OBERMAIER

By: _____
A Member of the Firm

Attorneys for Defendant Natelli
Office & P.O. Address
One Rockefeller Plaza
New York, New York 10020

MORRISON, PAUL, STILLMAN & BEILEY

By: _____
A Member of the Firm

Attorneys for Defendant Scansaroli
Office & P.O. Address
110 East 59th Street
New York, New York 10022

TO:

PAUL J. CURRAN, Esq.
United States Attorney
United States Courthouse
Foley Square
New York, New York 10007

McGUIRE & LAWLER
Attorneys for Defendant Bushnell
14 East 69th Street
New York, New York 10021

BIERBOWER & ROCKEFELLER
Attorneys for Defendant Davies
1625 K Street, N.W.
Washington, D.C. 20006

WILLIAMS, CONNOLLY & CALIFANO
Attorneys for Defendant Randell
1000 Hill Building
Washington, D.C. 20006

KEANE & BUTLER
Attorneys for Defendant Kelly
200 Park Avenue
New York, New York 10017

AFFIDAVIT OF RICHARD O. ARTHER IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

74 Cr. 43

Plaintiff,

- against -

CORTES W. RANDELL, ROBERT C. BUSHNELL, JOHN G. DAVIES, DENNIS M. KELLY, BERNARD J. KUREK, ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

AFFIDAVIT

Defendants.

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RICHARD O. ARTHER, being duly sworn, deposes and says:

1. I am the President of Scientific Lie Detection, Inc. I have administered polygraph examinations to the defendants Anthony Natelli and Joseph Scansaroli and determined from those examinations that each of them answered truthfully when he stated that he did not know at the time that the National Student Marketing proxy statement was filed that it contained false and misleading financial statements. I make this affidavit in support of the motion of defendants Natelli and Scansaroli for an order appointing an expert polygraphist to examine these defendants and to

admit my testimony, as well as that of the expert appointed by the Court, at the trial of this case.

2. I am a graduate of Michigan State University where, in 1951, I was awarded a Bachelor of Science degree in Police Administration. In 1960 I obtained a Master of Arts degree in Psychology from Columbia University. Upon graduation from Michigan State University in 1951, I began a polygraph internship in Chicago at John E. Reid & Associates. There I received instruction in the use of the polygraph from Mr. Reid and Fred E. Inbau, Professor of Criminal Law at Northwestern University School of Law. After six months of intensive training, I was certified as an expert polygraphist. I left John E. Reid & Associates in 1953, at which time I established my own polygraph suite in New York.

3. In 1964, I founded the Polygraph Examiners of New York State as the official organization of the State's professional polygraphists, and from that time until 1972, I was either its President or Board Chairman. I am a charter member of the American Polygraph Association, and in 1971 I received its John Hayden Award for distinguished contributions to the polygraph profession. I am also an Associate Member of the International Association of Chiefs of Police and a life member of the National Sheriffs Association and the Military Police Association.

4. From 1954 through 1962 I was on the Police Science staff of Brooklyn College and for three years served on the Police Science staff of Seton Hall University. I served for two years on the staff of the Graduate School of Public Administration of New York University, and was a staff member of the John Jay College of Criminal Justice.

5. In 1958 I helped to found the National Training Center of Lie Detection, and since 1964 I have served as its President. In that capacity I have given the basic polygraph training course to over 1,000 polygraphists from various state and local law enforcement agencies, as well as the United States Army, Coast Guard, and Marine Corps. In addition, during the past ten years I have conducted polygraph seminars throughout the country, which were attended by over 1,800 polygraphists. I have personally given polygraph examinations to over 22,000 people.

6. I have written over 176 articles dealing with polygraph, interrogation and scientific investigation, and I am the senior author of the book, Interrogation for Investigators, and the author of the college text, The Scientific Investigator.

7. The basic theory upon which the use of the polygraph is premised is that the telling of a lie causes emotional con-

flicts within a subject that cause certain measurable involuntary physiological reactions. The typical polygraph records changes in blood pressure, pulse, respiration and galvanic skin reflex. By analyzing the changes in these responses which occur as the subject answers specific questions, the expert polygraph examiner is able to determine whether or not the subject is answering truthfully.

8. The first known instance in which the recorded changes in blood pressure were used to determine truthfulness in a police case occurred in 1885, when Cesare Lombroso successfully used this technique in a murder case in which there were three suspects. From that time to the present, the science of truth verification has developed. The instruments used for measuring the subject's various responses have become more sophisticated. At the present time the polygraph is used by almost every major law enforcement agency. For example, it is used by the F.B.I., the C.I.A., the National Security Agency, Treasury Department, Post Office and all branches of the military.

9. It also receives widespread use in various law enforcement agencies. In Michigan for example, there is at least one fulltime polygraphist in each of the state police districts. In addition, more than 1,500 local law enforcement agencies throughout the country presently employ a polygraphist.

10. During the course of my 23 years of study, teaching and administering polygraph examinations, I have become convinced of the accuracy of the polygraph in determining whether the subject is answering questions truthfully. There have been numerous occasions when I have been asked to administer polygraph examinations to a number of people who could probably have stolen some particular item. On numerous occasions after I have determined from these tests which of those individuals had lied when they indicated that they did not participate in the thefts, my conclusions have been proven correct by the guilty parties confessing their guilt. My experience in this regard has been substantiated by other polygraphists who have attested to similar experiences. For example, Polygraph Examiner Orville Johnston of the Pontiac, Michigan Police Department reported in an article appearing in the March, 1961 issue of the magazine Law and Order that in one year he examined 230 people whom he determined to be lying when they denied involvement in a crime and 150 of these subsequently confessed. Of the 22,000 polygraph examinations that I have administered, there are only nine instances in which I concluded that the particular subject was telling the truth and it was later determined through other evidence that that person was lying. I have had no such experience within the last four years.

11. As a result of my experience and my study in this profession, I am convinced that the polygraph, when employed by someone with the proper training and experience, is both a valid and reliable method for determining whether someone is answering questions truthfully, that it has a degree of both validity and reliability in excess of 95%, and that it is more valid and reliable than are many forms of expert testimony that is admitted as evidence in the courts.

Richard O. Arther
RICHARD O. ARTHER

Sworn to before me this
12th day of April, 1974
Karen R. Noth

KAREN R. NOTH
Notary Public, State of New York
No. 41-7947930 Qual. in Queens Co.
Certificate filed in New York County
Commission Expires March 30, 1976

OPINION #40725 DENYING DEFENDANTS' PRE-TRIAL MOTIONS

FILED:
U.S.D.C.
MAY 21-74
SDNY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

-against-

CORTES W. RANDELL, et al.,

Defendants.
----------X

OPINION

74 Cr. 43 HRT

PAUL CURRAN, ESQ., United States Attorney
for the Southern District of New York,
by FRANKLIN B. VELIE, ESQ.,
Assistant United States Attorney.

ANDREW LAWLER, ESQ., New York City,
Attorney for defendant Bushnell.

THOMAS A. BUTLER, ESQ., New York City,
Attorney for defendant Kelly.

ROBERT L. WEINBERG, ESQ., Washington,
D.C., Attorney for defendant Randell.

JAMES J. BIERBOWER, ESQ., New York City,
Attorney for defendant Davies.

JOHN S. MARTIN, ESQ., New York City,
Attorney for defendant Natelli.

CHARLES A. STILLMAN, ESQ., New York City,
Attorney for defendant Scansaroli.

Opinion #40725 Denying Defendants' Pre-Trial Motions

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TYLER, D.J.

On May 3, 1974, there were heard the many pre-trial motions of the defendants in this case. Some of those motions were ruled upon after argument at the hearing; on others, the court reserved decision. This memorandum will reiterate the rulings heretofore made at the hearing and will dispose of those remaining matters on which the court reserved decision.

Motion to Dismiss Count 2 as Duplicitous
(Defendants Randell and Bushnell)

Defendants Randell and Bushnell move to dismiss count 2, claiming that it is duplicitous. See Rule 8(a), F.R.Cr.P. It is their apparent theory that because count 2 alleges misstatements of figures in two different financial statements contained in one National Student Marketing Corporation ("NSMC") proxy statement, it is improper to combine these two misstatements in one count.

As I view the matter, count 2 is not duplicitous in that it deals with two allegedly false financial statements in one proxy statement. See United States v. Lennon, 246 F.2d 24, at 27 (2d Cir. 1957), and cases therein cited. This motion, therefore, is denied.

Motion to Dismiss Counts 3 Through 12 as Duplicitous (Randell)

This motion by the defendant Randell to dismiss counts 3 through 12 on the grounds of duplicity is denied. First, this motion attacks the incorporation in these counts of "the means" set forth in subparagraphs (a) through (g) of count 1. Even though the means alleged might be viewed as spelling out separate criminal acts, this type of pleading is accepted and proper in the circumstances of this case. See Pereira v. United States, 202 F.2d 830, at 834 (5th Cir. 1953), aff'd., 347 U.S. 1 (1954). Second, Randell seemingly argues that counts 3 through 12 are improperly pleaded in that they do not particularize or rely upon only one of the proscribed forms of conduct delineated in Rule 10b-5 and Section 17(a) of the Securities Act of 1933. (e.g. (1)"any device, scheme or artifice to defraud..."; (2) "misrepresentations and omissions"; and (3) "fraudulent or deceitful acts or practices.") It is settled, however, that such separate and particularized pleading is not required. See United States v. Amick, 439 F.2d 351, 358-9 (7th Cir. 1971).

Motion to Dismiss the Indictment on the Ground that SEC Rule 10b-5 is Void for Vagueness (Randell)

Without citing any authorities therefore, Randell has moved to dismiss counts 1 and 3 through 11 on the ground that Rule 10b-5, on which the counts are based, is void for vagueness in the criminal context. In my view, neither the rule itself nor its possible application in this case in light of the rather specific allegations contained in the indictment support the conclusion that Rule 10b-5 is void for vagueness. This motion is denied in all respects.

Further Demands for Particulars (Randell and Bushnell)

As indicated at the hearing on May 3rd, this demand for further particulars by Messrs. Randell and Bushnell is denied, except to the extent as consented to by the prosecution.

Motion to Dismiss Counts 3 through 11 on the Ground that they are Impermissibly Vague (Randell)

Although his position on the matter is not entirely clear, it appears that defendant Randell also contends that counts 3 through 11

must be dismissed because the allegations contained therein are not pleaded with sufficient particularity. Rule 7(c), F.R.Cr.P. There is no merit to this broadside attack on the counts in question. This motion is denied.

Motion to Compel Pre-trial Discovery of Co-Conspirator Statements and Statements of Witnesses Whom the Government Does Not Intend to Call at Trial (Randell)

Both branches of this motion by defendant Randell are without merit.

First, as government counsel argues, there is no authority for any ruling that the prosecution must disclose statements of witnesses whom they do not intend to call, except, of course, in the context of the rule of Brady v. Maryland, 373 U.S. 83 (1963). As a practical matter, the prosecution in all probability does not certainly know at this point exactly what witnesses it will call. Since I assume that the government is well aware of its responsibilities under the rule of Brady v. Maryland, I deny this motion in its entirety.

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Insofar as this motion seeks production of co-conspirator statements, it is error to require disclosure of such statements to the extent that they are the statements of potential witnesses. United States v. Percevault, 490 F.2d 126 (2d Cir. 1974). In any case, I note that the government has acceded to the request of co-defendants that they have discovery of their own statements. Thus, Randell and his counsel may request such materials from their co-defendants and co-counsel. In all other respects, this motion is denied.

Motion to Admit Polygraph Evidence at Trial (Natelli and Scansaroli)

Defendants Natelli and Scansaroli move to permit a polygraph expert, who has already administered a lie detector test to one of the two movants, to testify at trial. As corollaries to this motion, these defendants also ask that a hearing be held on whether or not to receive testimony from a lie detector expert and that the court appoint its own expert to administer a lie detector test to the two movants.

Admitting that in recent years there have been a small number of isolated decisions in the federal courts favoring use of polygraph evidence, I note that there is no authority in this circuit for the admission of such evidence. Moreover, lie detector testimony has recently been excluded in federal criminal cases by rulings of federal appellate courts. See United States v. Zeiger, 475 F.2d 1280 (D.C. Cir. 1972); United States v. Frogge, 476 F.2d 969, at 970 (5th Cir. 1973). This motion in all of its aspects is denied.

Motions to Compel Disclosure of Certain Portions of the Grand Jury Proceedings (Randell, Natelli and Scansaroli)

Defendant Randell asks (1) for the transcript of the prosecutor's instructions to the grand jury; (2) to be informed whether the entire indictment was read to the grand jury before it was voted; and (3) an indication of the vote of the grand jury. To the extent that I understand it, Randell argues that should this court accept his argument that Rule 10b-5 is too broad but nonetheless refuse to dismiss the counts alleging violations of Rule 10b-5, then it follows that the prosecutor's instructions to the grand jury must be reviewed to determine whether the prosecutor

correctly and adequately instructed the grand jury as to what Rule 10b-5 means. The short answer to this application is that it is frivolous on its face. Put differently, Randell has not showed any particularized need for such a bizarre form of relief which, if granted, would only add one other tier of appellate review of instructions of law to the criminal justice system.

Defendants Natelli and Scansaroli seek an order requiring that the transcripts of the testimony of four grand jury witnesses who, at material times, were associated with Peat, Marwick & Mitchell when that firm was doing public accounting work for NMSC, but who are not defendants in this case. Presumably, these four persons effectively join in this request. According to the moving papers, these four individuals have agreed to testify for the two moving defendants. The cases cited for this relief are inapposite. See, e.g. United States v. Youngblood, 379 F.2d 365 (2d Cir. 1967). But, as this court indicated at the conclusion of argument on May 3, however, it is ruled that this motion is denied without prejudice to renewal after the government concludes its case in chief at trial. Without elaboration, it seems premature to be concerned about such a motion now, particularly as

it may turn out that one or more of these witnesses will not be called by the defense.

There remains for discussion Randell's request to be advised whether the entire grand jury read the indictment in its entirety and that a head count on the vote be furnished to him or his counsel. Both motions are without merit and are rejected. First, I can conceive of no useful purpose of finding out whether or not every member of the grand jury read the instant indictment, particularly in the absence of any claim to the contrary. See, similarly, United States v. Niedelman, 356 F. Supp. 979, at 983 (S.D.N.Y. 1973). Second, it appears that Randell's request for the vote count is based upon the contention that the indictment should be dismissed unless it can be established that the grand jury separately considered probable cause to indict each defendant on each count. There is no authority that I can find for such drastic relief, and certainly Randell has submitted none that is pertinent and in point to this court. Hence, these branches of his motion are denied.

Motion to Inspect Analyses by SEC Employees of NSMC Financial Statements (Natelli and Scansaroli)

At the hearing of this motion on May 3rd, the court denied it in its entirety. In part, it was reasoned that since as a matter of law the Securities and Exchange Commission does not pass upon the accuracy of such filings, see 15 U.S.C. § 78(1934), it is difficult to understand what use or validity these materials would have, unless, of course, one of the persons who prepared them happens to appear as a government witness. 18 U.S.C. § 3500. Furthermore, as the court also attempted to indicate at argument, these analyses do not bind the SEC as either a legal or practical matter. Hence, this application is denied in its entirety.

Motion to Dismiss for Pre-Indictment Delay (Randell)

As ruled by the court at the hearing on May 3rd, this application is premature. Hence, it is denied without prejudice to renewal at trial, if defendant Randell and his counsel are so advised. See United States v. Marion, 404 U.S. 307 (1971).

Motions for Trial Severance (Davies, Natelli and Scansaroli)

Defendant Davies is charged in all counts of the indictment save for count 2. Thus, it is not surprising that he has offered no facts whatsoever to sustain his burden of establishing that he will not be able to obtain a fair trial in the absence of severance pursuant to Rule 14, F.R.Cr.P.

Defendants Natelli and Scansaroli are named only in count 2 of the indictment. For this reason alone, their motion presents preliminarily a little more surface plausibility than that of Davies. Recognizing that a motion of this kind pursuant to Rule 14 is addressed to the discretion of the court, defendants argue that the jury will think "[s]omehow the accountants, Natelli and Scansaroli, were participants in the fraudulent scheme." In my view, this argument is somewhat nebulous and unpersuasive. To begin with, the jury certainly will understand that the two defendants in question are only accused of participating with other defendants in the making of a false proxy statement; the jury also will understand that those defendants are named in no other

counts. According to the government, its evidence will show that Natelli and Scansaroli were willing to participate in making the false statements for reasons of their own and later, to prevent detection and loss of their licenses, they were willing to conceal the facts of their participation. With this kind of evidence, and adequately formulated instructions from the court, there should be no difficulty in assuring a fair trial to the two accountant defendants. Furthermore, severance would require the duplication of a great deal of background evidence, at least, in order to prove count 2 as against the two moving defendants. Hence, in the exercise of discretion, I conclude that it would be improvident to grant a severance to the two defendants here.

But Natelli and Scansaroli have another string in their bow in that they move for severance pursuant to Rule 8(b), F.R.Cr.P. on the theory that count 2 is improperly joined to the indictment since count 2 is not alleged to be a part of the same transactions participated in by the other defendants and charged in the other counts. Passing the possibility that this is inconsistent with their Rule 14 arguments, I read the indictment to plainly allege that the making of the false proxy statement charged in count 2 is one of the several means and devices underlying other counts in the indictment. Their motion on this theory is also denied.

Motions for Change of Venue to the
District of Columbia (Randell and Davies)

Of the six defendants who apparently will stand trial, only Randell and Davies move to transfer or change venue. Davies is a London barrister and is presently in the United Kingdom under a bail order of this court. Randell, it is true, lives in or adjacent to the District of Columbia. Parenthetically, defendant Natelli also lives in the District of Columbia, but does not join this motion. From all that appears, the remaining defendants reside in the Southern District of New York.

The two moving defendants do not claim that venue is improper in this district; they urge, pursuant to Rule 21(b), F.R.Cr.P., that they are entitled to a transfer "...for the convenience of parties and witnesses, and in the interest of justice."

It seems to be conceded that NSMC, though a Delaware corporation, has its offices and files presently in Chicago. However, during the period material to this indictment, NSMC had its principal offices here in New York City. Thus, defendant Randell worked here full-time, even though he apparently maintained his residence in McLean, Virginia.

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Bushnell and Kelly worked full-time in New York. Defendant Davies lived in New York during the period in question and worked in the New York office full-time from June, 1969 until early 1970.

The prosecution witnesses will be drawn from various parts of the country, but it seems likely that the greater number will be persons, some residents of New York, giving evidence to events in this judicial district, such as the overt acts in the conspiracy count, the sales charged in counts 12 through 14, etc. Moreover, the government now has in this district all of the relevant records required for the trial of this case, including most records which the defendants might deem relevant for their own defense.

Finally, I note that although trial was scheduled to begin in July, 1974, all defendants have moved to adjourn the trial until sometime in September, 1974. However the status of the docket of this court compares with that of the District of Columbia court in detail, it is apparent that there is no time advantage to be gained from transfer.

Without extended discussion, therefore, in the exercise of discretion, this court determines that the motion to transfer of these

two moving defendants is without persuasive factual foundation. Hence, it is denied.

Motions to Dismiss Count 2 for Improper Venue (Randell, Natelli and Scansaroli)

The venue provision of the Securities Exchange Act of 1934 is comparatively broad:

> "Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred." 15 U.S.C. § 78aa

Section 32, 15 U.S.C. § 78ff, the statute in question in count 2, provides penal sanctions for "...any person who wilfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter...."

Notwithstanding this language, the moving defendants contend that venue is improper because the proxy statement in which the alleged false statements were made was required to be filed and indeed was filed with the SEC in Washington. Hence, the argument goes, this means that the District of Columbia is the only proper district wherein count 2 can be tried.

The short answer to this argument may be found in United States

v. Pope, 139 F. Supp. 12 (S.D.N.Y. 1960), wherein Judge Weinfeld, in a case involving a count very much like count 2 in this indictment, held that venue in this district is proper.

In addition, however, I note that defendants rely upon the case of Travis v. United States, 364 U.S. 631 (1961), which dealt with quite a different problem - that of filing of non-Communist affidavits by union officers. In Travis, the Supreme Court was concerned with § 9(h) of the National Labor Relations Act, as amended by the Taft Hartley Act, 61 Stat. 136, 196, and further amended by the Act of October 22, 1951, § 1(d), 65 Stat. 601, 602, and subsequently repealed. This section required the filing of a non-Communist affidavit as a condition precedent to a union's utilization of the procedures of the National Labor Relations Board. Although the statute under which the prosecution was brought, now 18 U.S.C. § 1001, referred to the making of a false statement, the Supreme Court held that there was no offense until the statement had been filed, since the statute also required that the false statement be made in a matter "within the jurisdiction of any department or agency of the United States." According to the Court, the filing had to be completed before there was "a matter within the jurisdiction of the Board within the meaning of the false statement statute." Id. at 636.

Thus, although the language of the false statement statute is somewhat analogous to § 32 of the Act, 15 U.S.C. § 78ff, the rationale of the Travis case is not applicable since the statute here speaks of making a false statement rather than the filing of a false statement. It is for this reason that Travis has been held to be limited to its facts, see United States v. Slutsky, 487 F.2d 832, 839 n.8 (2d Cir. 1973), and not applied in cases where a statute is concerned with the making of false statements. Id.

In their reply memorandum, the moving defendants cite the case of Investors Funding Corporation v. Jones, Docket No. 73-1791 (D.C. Cir., filed March 26, 1974), which held that venue for an action concerning the late filing of a report with the SEC was proper in the District of Columbia, the district where the report was due. The conduct complained of in the Investors Funding case, however, involved a failure to act rather than the affirmative making of a false statement. The acts constituting the violation, therefore, must be considered to occur in the place of filing. See United States v. Lombardo, 241 U.S. 73 (1916). Furthermore, the statute in Investors Funding refers to filing, rather than making false statements. For these reasons, therefore, the instant case is distinguishable from Investors Funding.

Put simply, the thrust of the crime charged in count 2 is the making of false statements in the proxy statement which by law, of course, had to be filed; - in short, the crime charged is the making of false statements and not the act of filing as such. Upon this reasoning, this motion of the defendants is denied.

Motion of All Defendants to Obtain Tapes or Transcripts, if any, of Their Conversations

All defendants appear to seek information as to whether or not there exist any transcripts and/or tapes of recorded conversations of theirs to government agents or agencies. The government has agreed to do a check of the various agencies which likely would have any information about the defendants in this case and will report to counsel and the court at a later date.

Motion to Suppress Documents and/or Testimony Before the Securities and Exchange Commission (Randell)

Randell has moved to suppress the use of all documents and testimony obtained from him in proceedings before the SEC. This

motion breaks into several branches, not all of which were originally raised in his motion papers. Randell maintains that he testified under "inherently coercive circumstances" and that the warnings given to him by the SEC staff prior to his testimony were inadequate, particularly in that he was not specifically advised that he was a target or potential target of a criminal investigation. Since these contentions, in my view, are refuted by contemporaneous documents and the record of the testimony before the SEC, all aspects of this motion to suppress are denied without an evidentiary hearing.

Randell first testified before the SEC in late May, 1971. He was represented then and thereafter by two law firms. At the very outset, Mr. Belkin, a Commission attorney, specifically advised Randell that any evidence he might give could be used against him in any federal or state proceeding, civil or criminal. Belkin also told Randell that he could refuse to give testimony or other evidence which Randell might believe tended to incriminate him. On eight subsequent occasions Randell testified before the SEC with at least two of his lawyers present. On each of these appearances in May, June and July, 1971, he was specifically asked and acknowledged his understanding of the warnings summarized heretofore.

Moreover, accepting as true that no staff attorney or Commissioner specifically told Randell that he was a target or potential target of a criminal investigation, neither the law nor common sense support the proposition that the SEC or one of its agents is obliged to give such a specific warning or advice. The SEC does not prosecute criminal cases; it can only refer criminal matters for consideration to the Attorney General. Moreover, it is enough if the SEC properly advises the witness of his rights against self-incrimination. See United States v. Squeri, 393 F.2d 785 (2d Cir. 1968); Dosek v. United States, 405 F.2d 405 (3th Cir. 1968).

One other aspect of this motion by Randell deserves brief discussion. For the first time in his reply brief, so far as I can understand, Randell claimed that he turned over papers to SEC staff members pursuant to a subpoena duces tecum - and that he did this prior to receiving the warnings heretofore discussed when he appeared to give oral testimony. Documents of record belie this belated claim. In January, 1971, the aforesaid Mr. Belkin sent a subpoena duces tecum to Randell. With the subpoena was a letter advising Randell of his right to be accompanied and advised by counsel prior to and at the time of

return under the subpoena. Thus, in early February, 1971, Belkin met Randell and his attorneys at the latters' offices. At that time, Belkin advised Randell of his constitutional right to refuse to turn over the papers. Though he acknowledged his understanding of that right, Randell in fact did produce various papers under the subpoena.

Motion of Defendant Kelly to Suppress
His Grand Jury Testimony

In substance, defendant Kelly maintains on this motion that beginning on or just before November 1, 1973, he and his lawyer were misled by representations of the prosecutor then in charge of this case to the effect that Kelly was not a target of the grand jury investigation. Thus, it is asserted by Kelly's counsel that, but for this misrepresentation, he would never have permitted his client to testify voluntarily before the grand jury.

At the hearing of this motion on May 3, the court noted that the record did not include an answering affidavit from Harold F. McGuire, Jr., Esq., the former Assistant United States Attorney who presented evidence to the grand jury. At the court's request, an affidavit of Mr.

McGuire was filed on May 10, 1974. Thereafter, on May 15, 1974, a reply affidavit on this issue was filed by Thomas A. Butler, Esq., Kelly's attorney.

Although it is doubtful that Kelly and his counsel were misled by government counsel to Kelly's prejudice, I cannot be certain of the relevant facts from the affidavits now on file; indeed, some of the facts alleged are in direct conflict. Moreover, the court has not been furnished with transcripts of Kelly's appearance or appearances before the grand jury. In fairness to the parties involved, I conclude that appropriate resolution of the issues on this motion should await a brief evidentiary hearing, at which Messrs. Butler, McGuire and other participants, if any, in the conversations can be heard, and relevant grand jury minutes produced for the court's inspection. This hearing should be held reasonably promptly, and counsel are directed to communicate with chambers to arrange a mutually convenient date therefor.

All branches of this motion are without merit and are thus denied.

Opinion #40725 Denying Defendants' Pre-Trial Motions

In summary, motions disposed of as indicated in this memorandum. It is so ordered.

Dated: May 21, 1974

U.S.D.J.

GOVERNMENT'S BILL OF PARTICULARS WITH LETTER AMENDMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA, :

- v - : BILL OF PARTICULARS

CORTES W. RANDELL, et al., : 74 Cr. 43

Defendants.

- - - - - - - - - - - - - - - - - - - -x

S I R S :

For its Bill of Particulars, the United States of America states as follows:

1. The approximate period of time referred to by the phrase "at all relevant times" in the Introduction to the Indictment is from January, 1968 to September, 1970.

2. The Government does not allege the existence of co-conspirators not named in the Indictment at this time.

3. The nature of the "schemes, artifices and devices" alleged in paragraph 2 of Count One was to inflate the price of NSMC stock by means of materially false and misleading statements as to NSMC business activities, sales, earnings and prospects, and to use NSMC stock to obtain money and property. Refer to paragraph 5 of Count One, and overt acts alleged.

4. (A) The financial reports in NSMC's 1968 annual report to shareholders is materially false and misleading in that:

(i) The consolidated balance sheet as of August 31, 1968 materially overstated assets

by approximately $1,700,000 as a result of the improper recording and accounting for unbilled accounts receivable and accrued costs and estimated earnings on contracts in progress, and materially overstated liabilities by approximately $1,000,000 as a result of the improper recording and accounting for accrued costs on contracts in progress.

(ii) The consolidated statement of earnings for the fiscal year ended August 31, 1968 materially overstated sales by approximately $1,700,000, costs by approximately $1,000,000 and earnings before income taxes and extraordinary items by $695,689 (out of a total of such earnings reported of $699,116) as a result of the improper recording of sales and related costs from purported contracts in progress on which virtually no work had been done and no legally binding contract existed.

(iii) The consolidated statement of retained earnings for the fiscal year ended August 31, 1968 materially overstated retained earnings as a result

of the matters discussed in subparagraphs (i) and (ii) above as well as net earnings per share of common stock.

(iv) Footnote 3 to the Consolidated Financial Statements of defendant NSMC entitled "Contracts in Progress" does not disclose that a material amount of the purported contracts in progress which were accounted for on the basis of their being contracts at August 31, 1968 were not, in fact, contracts, never existed as client commitments, were entered into after August 31, 1968 or contained guarantees which precluded their being recorded as income.

(v) The opinion of PMM is materially false and misleading in that:

(1) The examination made by defendants Natelli and Scansaroli was not conducted in accordance with generally accepted auditing standards, and in particular was at variance with those promulgated by the American Institute of Certified Public Accountants (General Standards Two and Three, Field Work Standards Two and Three, and Reporting Standards One, Two and Three).

(2) The financial statements of NSMC were not prepared in conformity with generally accepted accounting

principles applied on a basis consistent with that of the preceding year in all material respects. A change in the application of accounting principles which permitted large amounts of "contracts in progress" to be recorded before actual work had been performed was not disclosed in the auditors' opinion, and was insufficiently disclosed elsewhere, and, as employed, was not in conformity with generally accepted accounting principles.

(3) The financial statements of NSMC do not present fairly the consolidated financial position and results of operations of NSMC and subsidiaries at August 31, 1968, for the reasons noted in subparagraphs (i) through (iii) above.

(vi) The President's letter to stockholders dated November 15, 1968 is false and misleading in repeating the false sales and net earnings described above.

(vii) The financial statements were false and misleading in other material respects which are set out at length in the Report Prepared Pursuant to Judgment of Permanent Injunction in SEC v. NSMC, et al., Civ. Action 225-72 (D.D.C.) (hereinafter, the "Touche, Ross Report.")

4. (B) On or about December 31, 1968, NSMC filed with the Securities and Exchange Commission at its

office in the District of Columbia an annual report on Form 10-K [17 CFR 249.310] for the fiscal year ended August 31, 1968 pursuant to Section 13(a)of the Exchange Act. Said annual report on Form 10-K contained the same audited consolidated financial statements for the fiscal year ended August 31, 1968 which had been mailed to shareholders of NSMC and others. Said annual report on Form 10-K is materially false and misleading for the reasons set forth in paragraph 4. (A) above.

4. (C) The Consolidated Statement of Income of NSMC for the six months ended February 28, 1969 is materially false and misleading in that:

(i) The Consolidated Statement of Income materially overstates sales by approximately $1,400,000 (which overstatement included a purported sale made to Pontiac Division -- General Motors Corporation for approximately $800,000) as a result of the improper recording of contracts in progress.

(ii) The Consolidated Statement of Income materially overstates net income after taxes.

(iii) The report failed to disclose that unbilled accounts receivable totalling approximately $1,000,000

and related accrued liabilities previously reported for the fiscal year ended August 31, 1968, and for the three months ended November 30, 1968, were reversed as of or prior to February 28, 1969. The report failed to disclose the reasons for such reversals and the amount of the reduction in net income and retained earnings resulting from such reversals.

(iv) The report is false and misleading in other material respects which are set out at length in the "Touche, Ross Report".

4. (D) The financial statements in a proxy statement dated September 27, 1969 are materially false and misleading in that:

(i) See, 4(A), (B) and (C) above, and paragraphs 13 and 14 below, and paragraphs 3 and 4 of Count 2 of the Indictment.

(ii) Financial results of 1968 are re-certified and presented whereas the 1968 financial statements should have been prominently restated by management, or de-certified by PMM, or issued with an adverse accountant's opinion, or with other full disclosure

that the "percentage of completion" method of accounting as employed by NSMC had been proven to be inappropriate and grossly unreliable, and that material amounts of 1968 sales, assets, and earnings had been discovered to be non-existent and had been written off. In particular, the proxy statement failed to disclose that 1968 unbilled receivables and accrued costs and estimated earnings on contracts in progress of approximately $1,000,000, reflected as assets in NSMC's annual report to shareholders for fiscal year ended August 31, 1968 and NSMC's annual report on Form 10-K for fiscal year ended August 31, 1968, were written off during the nine month period ended May 31, 1969, and that $750,000 of the write-off was applied retroactively to NSMC's fiscal year ended August 31, 1968.

(iii) NSMC failed to disclose in the proxy statement that the write-off referred to above had the

effect of materially reducing 1968 assets, and sales by approximately $750,000 and earnings before taxes and extraordinary items by approximately $210,000 and of materially reducing net earnings.

(iv) NSMC's Consolidated Statement of Earnings for the fiscal year ended August 31, 1968 materially overstates sales by approximately $1,000,000, cost of sales by approximately $500,000, net earnings before extraordinary items and taxes by approximately $485,000 and earnings from extraordinary items by approximately $188,000.

(v) Note (C) to NSMC and subsidiaries consolidated statement of earnings is false and misleading in that:

(1) It states that "figures for 1968 have been restated in certain instances to make their presentation consistent with current accounting practices" whereas restatements were made because of write-offs of material amounts of sales, costs, and earnings.

(2) It states "there was no material effect as a result of such restatement", whereas the restatements reflecting such write-offs were indeed material.

(3) It omitted to disclose the said material write-offs.

(vi) NSMC's Consolidated Balance Sheet as of the year ended August 31, 1968 materially overstates assets by approximately $1,000,000 as a result of the improper recording of unbilled accounts receivable and accrued costs and estimated earnings on contracts in progress.

(vii) NSMC's Consolidated Balance Sheet as of fiscal year ended August 31, 1968 materially overstates accrued costs on contracts in progress by approximately $500,000 as a result of the improper recording of unbilled accounts receivable and accrued costs and estimated earnings on contracts in progress.

(viii) NSMC's Consolidated Balance Sheet and Statement of Retained Earnings for fiscal year ended August 31, 1968 materially overstates retained earnings.

(ix) The report of PMM as to the consolidated financial statements of NSMC and subsidiaries is false and misleading in that generally accepted auditing standards and generally accepted accounting principles were not employed. Refer to

paragraph 4(A)(v) and 4(D)(ii), above.

(x) NSMC's Consolidated Balance Sheet as of May 31, 1969, materially overstates assets by approximately $2,400,000 as a result of the improper recording of $1,900,000 in unbilled receivables and accrued costs and estimated earnings on contracts in progress, and the overstatement by approximately $500,000 in deferred costs relating to prepaid sales programs and promotional items which should have been recorded as expenses of the period.

(xi) NSMC's Consolidated Balance Sheet as of May 31, 1969, materially understates accounts payable by approximately $300,000.

(xii) NSMC's Consolidated Balance Sheet as of May 31, 1969, materially overstates accrued costs on contracts in progress by approximately $1,000,000.

(xiii) NSMC's Consolidated Balance Sheet and Statement of Retained Earnings as of May 31, 1969, materially overstates retained earnings as a result of the items described in paragraphs (x), (xi) and (xii) above.

(xiv) NSMC's Consolidated Statement of Earnings for the nine months ended May 31, 1969, materially overstates sales as a result of the improper recording of unbilled accounts receivable and materially overstates earnings before income taxes and extraordinary credit. See paragraph 14.

(xv) The Consolidated Statement of Earnings materially overstates net income after taxes. See subparagraph (xxi), below.

(xvi) The Consolidated Statement of Earnings materially overstates cost of sales.

(xvii) NSMC's earnings per share before and after extraordinary credit for 1968, and for the nine months ended May 31, 1969 is materially overstated.

(xviii) Footnote 3 to the Consolidated Financial Statements of NSMC entitled "Contracts in Progress" fails to disclose that the percentage of completion method of accounting as employed by NSMC had proven to be inappropriate and grossly unreliable, and that a material amount of contracts in progress,

which were accounted for on the basis of obtaining client commitments, were never in fact client commitments and were not in fact contracts.

(xix) Under NSMC and subsidiaries consolidated balance sheet "additional paid in capital" is misstated by approximately $84,000, and earnings before taxes for the period ending May 31, 1969 is overstated by the same amount as the said "Paid in capital" should have been recorded as expenses of the period.

(xx) NSMC's proxy statement fails to give effect or to disclose that defendant Randell on behalf of NSMC entered into employment agreements with various individuals to induce them to become employees of NSMC and to induce them to accept salaries and other compensation less than what they otherwise would have, and as part of such agreements, defendant Randell transferred his money and his NSMC securities to such individuals. In particular, Note (2)(K) to the Notes to Consolidated Financial Statements does not disclose that the primary reason

for the acquisition of Consultants for Market Isolation, Inc. (CMI) was to compensate two NSMC employees for prior and future services; that CMI had substantially no assets, and that the transaction was not bargained for at arms length.

(xxi) Under NSMC and subsidiaries consolidated statement of earnings, amounts for extraordinary credits, styled "Reduction of deferred tax provision as a result of net operating loss carry forwards" are based upon improper accounting, and thus improperly reduce deferred taxes payable and cause a concomittant overstatement of net earnings.

(xxii) The said financial statements were false and misleading in other material respects which are set out at length in the Touche, Ross report.

(xxiii) The various pro forma statements are false and misleading to the extent that they incorporate the above false and misleading financial statements of NSMC.

4. (E) (i) The letter dated August 14,

1969 from Thomas E. Mullen to Robert C. Bushnell was fraudulent in that it purported to accept a proposal dated May 7, 1969 by NSMC on behalf of Eastern Airlines which would result in an expenditure of not less than $820,000 by Eastern for the 1970 fiscal year when in fact Eastern Airlines had not accepted any such proposal by NSMC and had not decided to make such an expenditure.

(ii) The letter dated August 27, 1969 from Juan Homs, Jr. to Robert C. Bushnell was fraudulent in that it purported to confirm a verbal commitment from American Airlines to NSMC to spend $535,000 for NSMC marketing, promotional and advertising services for the year 1970 when in fact no such commitment existed and American Airlines did not intend to make such an expenditure. It is further fraudulent in that although the body of the letter purports to be written by Juan Homs, the letter was drafted by Persons at NSMC.

5. The NSMC annual report for the fiscal year ended August 31, 1968 was mailed to the shareholders on

or about December 1, 1968. The report was filed with the SEC as part of the annual report on Form 10-K on December 31, 1968.

6. The Government contends that the 2,000,000 shares of NSMC common stock referred to in paragraph (5)(g) of Count I included the NSMC stock offered and sold by defendants Randell, Bushnell and Kelly and referred in Counts XII through XIV.

7. The forged letter referred to in Overt Act Number One was prepared on or about May 1, 1969 at the offices of NSMC in the Time-Life Building in Manhattan, New York from between 8:00 to 10:30 P.M. Cortes W. Randell prepared the forged letter with the unwitting assistance of Andrew Tobias.

8. The financial statement referred to in the Second Overt Act is a consolidated earnings statement for NSMC for the nine month periods ended May 31, 1968 and 1969 contained in a draft proxy statement. (The said statement may be examined at the office of the United States Attorney during business hours by appointment. The information contained therein was printed as the August 15, 1969 draft of the proxy statements.) It was read over the telephone from the plant of the Pandick Press to Donald Jeffers of Inc. It was materially false in that it materially overstated sales and costs of sales for that period as a result of the improper recording of unbilled accounts receivable, including nonexistent "commitments" from the Pontiac Division of General

Motors, and Syntex Corporation, and therefore materially overstates earnings before and after income taxes and extraordinary credit. The said statement further overstated net income after extraordinary credit as a result of the recording of an improper and nonexistent credit of $437,342 styled "reduction of deferred tax liability for tax effect on net operating loss carry forwards to future periods." NSMC's earnings per share before and after extraordinary credit is materially overstated. The said financial statement was false and misleading in other material respects which are set out in paragraph 4(D) above.

9. The letter referred to in the Third Overt Act was delivered to Cortes W. Randell and Anthony Natelli at the offices of the Pandick Press, Inc., 22 Thomas Street New York, New York 10006. Defendant Kelly knew the letter was fraudulent.

10. Bushnell delivered the gold paperweight in or about September or October, 1969, the exact date unknown. The cost of the paperweight was $1,500. The date of exact delivery of the stock and statue is unknown, but it is believed to have been at Hom's office, at American Airlines, 633 Third Avenue, New York City. The makers of the letter were persons at NSMC, and it was signed by Juan Homs.

11. The meeting referred to in the Fifth Overt Act ran for approximately the entire business day in the main conference room at the offices of White and Case, 14

Wall Street, New York, New York. The following persons attended that meeting:

Cortes W. Randell

John G. Davies

James F. Joy

Cameron Brown

Robert P. Tate

Paul E. Allison

William J. Bach

Mat E. Meyer

Louis F. Schauer

Marion J. Epley

John C. Provine

David A. Swope

Winthrop Rutherford

12. The definitive proxy was filed October 3, 1969 by representatives of White & Case at the offices of the Securities and Exchange Commission in Washington, D.C.

By the time of filing said proxy statement a material amount of the 1968 unbilled accounts receivable and sales had proven to be non-existent and had been written off of NSMC's financial records as follows:

American Airlines	$17,037
Ban	19,500
Barnes-Hind	47,850
Barnes-Hind	2,400
Bizaar Products	5,580

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Campana	$ 21,900
Carnation	25,018
Chattem	53,775
Cheseborough Ponds	28,031
Cheseborough Ponds	91,250
Chicken Delight	50,625
Clairol	567,812
Dupont	6,978
Dupont	8,535
Dupont	64,425
Eastern	5,000
Eastern	361
Eastern	2,206
Eastern	1,875
Eastern	4,350
Eastern	13,440
Eastern	13,440
Faberge	53,775
Gossard	53,775
Listerine	70,200
Nationwide Insurance	2,650
Pace	14,492
Shick	30,000
Syntex	50,309
Syntex	50,309
Syntex	21,960
Waldorf Astoria	954
	$1,399,812

14. The proxy statement described in paragraphs 4(D) and 13 above contained an "unaudited" statement of earnings for the nine months ended May 31, 1969 which stated "net sales" as $11,313,569. This amount is materially false and misleading in view of the inclusion of the following items:

Barnes-Hind	$22,600
Carnation	11,200
Nationwide	2,000
Tanya	32,200
Eastern Airlines	519,152
Westinghouse	11,250
Levi Straws	12,000
Pearl Beer	8,500
Western Union	5,200
Lensine	6,750
F. Hiteshaw Assoc.	22,400
Clairol	24,800
Clairol	6,000
Larism Brothers	10,350
Chevrolet-Veterans List	500
Chrysler	112,500
Capital Records	30,000
	$837,202

15. The nature of the deceptive devices and contrivances referred to in Counts Three through Eleven and the nature of the schemes and artifices, untrue

statements, and the transactions referred to in Counts Twelve through Fourteen was to inflate the price of NSMC stock by means of materially false and misleading statements as to NSMC business activities, sales, earnings and prospects, and to use NSMC stock to obtain money and property. Reply to paragraph 3, above.

The following are known to be among the pension funds, trust funds, and institution investors who purchased NSMC stock in the transactions referred to in Counts Twelve through Fourteen:

National Fire Insurance of Hartford
The Dreyfus Offshore Trust, N.V.
First National City Bank
Wachovia Bank and Trust Company
Pace & Co. - c/o Mellon National Bank
First Wisconsin Trust Co.
Donaldson, Lufkin & Jenrette

16. The Government will prove some or all of the following as jurisdictional bases of the counts indicated;

COUNT I

1. All the jurisdictional bases set forth with respect to Counts II through XIV, infra.

2. Mailing of 1969 Half Year Report to NSMC shareholders.

3. Mailing of 1968 annual report to NSMC shareholders.

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COUNT II

1. Trip by airplane by Cortes W. Randell, Joseph Scansaroli, Anthony Natelli, Bernard J. Kurek, John Buck, and John Stalick, from National Airport, Virginia to offices of the Pandick Press, 22 Thomas Street, New York, New York.

2. Letter to the SEC from White & Case dated August 20, 1969 enclosing preliminary copy of proxy statemen

3. Transmission of definitive proxy from White & Case, 14 Wall Street, New York to SEC on October 3, 1969.

COUNT III

1. Letter enclosing draft of merger agreement from Michael Mathews, White & Case, 14 Wall Street, New York New York 10005 to Cortes W. Randell, NSMC, 1271 Avenue of the Americas, New York, New York dated May 17, 1969.

2. Letter enclosing draft of merger agreement from Michael Mathews, White & Case, 14 Wall Street, New York, New York to John G. Davies, 1100 Connecticut Avenue, N.W., Washington, D. C. dated May 7, 1969.

3. Memorandum enclosing draft of merger agreement from Michael Mathews, White & Case, 14 Wall Street, New York, New York, to Bernard Kurek, NSMC, 1271 Avenue of the Americas, New York, New York dated May 7, 1969.

4. Memorandum enclosing draft of merger agreement from Michael Mathews, White & Case, 14 Wall Street, New York, New York, to Anthony Natelli, Peat, Marwick, Mitchell & Co., 1140 Connecticut Avenue N.W., Washington, D. C. dated May 7, 1969.

5. Mailing of Purchase Agreement and memo from Michael Mathews, White & Case, to Anthony Natelli, Peat, Marwick, Mitchell & Co., 1140 Connecticut Avenue N.W., Washington, D. C. on May 27, 1969.

6. Telegram from Secretary of State of New York to Edward Landau, Lowenthal, Landau, Fischer & Weisinger, Manhattan, New York, dated October 10, 1969.

7. Instructions telephoned on October 9, 1969 from 14 Wall Street, New York, New York to representative of United States Corporation Company in Washington, D. C. to record and file the Articles of Merger in the District of Columbia.

8. Transmission and filing of a definitive proxy statement used to effectuate this merger from the offices of White & Case, 14 Wall Street, New York, N.Y., to the SEC, Washington, D.C. on October 3, 1969.

COUNT IV

1. Transmission and filing of a definitive proxy statement used to effectuate this merger from the offices of White & Case, 14 Wall Street, New York, New York, to the SEC, Washington, D.C. on October 3, 1969.

2. Telegram from the Secretary of State of New York to David Swope, White & Case, 14 Wall Street, New York, New York, dated October 11, 1969.

3. Trip to Washington, D. C. by David Swope, Esq., an attorney with offices at White & Case, 14 Wall Street, New York, New York, to Washington, D. C. to file a registra-

tion statement on Form S-14 with the Securities and Exchange Commission on September 26, 1969.

4. Issue of press release by Farley-Manning Associates, 340 Madison Avenue, New York, New York dated August 11, 1969.

COUNT V

1. Transmission and filing of a definitive proxy statement from the offices of White & Case, 14 Wall Street, New York, New York, to the offices of the Securities and Exchange Commission on October 3, 1969.

2. Mailing of a definitive proxy statement to NSMC shareholders to solicit votes of the shareholders at a meeting held in the District of Columbia on October 8, 1969.

3. Press release by Farley-Manning Associates, Inc., 342 Madison Avenue, New York, New York 10017 dated July 28, 1969.

4. Mailing of Enclosure Memo and two copies of agreement from Michael Mathews, White & Case, 14 Wall Street, New York, New York, to Herbert Sachs, Mar-Clay Mills Inc., Rehobeth Boulevard, Milford, Delaware on July 31, 1969.

5. Press release from Farley-Manning Associates, Inc., 342 Madison Avenue, New York, New York 10017 dated October 17, 1969.

6. Letter from Robert W. Chaplick, United States Corporation Company, Sixty Wall Street, New York, New York, to Arthur Malman, White & Case, 14 Wall Street, New York, New York, dated October 13, 1969.

7. Letter from John E. Groome, Director Corporation Bureau, Department of State, Harrisburg, Pennsylvania, to Garvin B. Kiernan, United States Corporation Company, 60 Wall Street, New York, New York, dated October 17, 1969.

8. Two letters from John Davies, NSMC, 345 Park Avenue, New York, New York, to M. J. Aquilino, The Riggs National Bank, 800 17th Street, N.W., Washington, D. C., dated November 10, 1969.

9. Travel by David Swope, an attorney with offices at White & Case, 14 Wall Street, New York, New York, to Washington, D. C., to the offices of the SEC to file a registration on Form S-14 on September 24, 1969.

10. Telegram dated October 11, 1969 from John C. Brinton, Director, Bureau of Corporation Taxes, Harrisburg, Pennsylvania, to David Swope, White & Case, 14 Wall Street, New York, New York.

11. Telegram dated October 16, 1969 from Alfred Goldstein, Director of Corporations, District of Columbia, to Arthur Malman, White & Case, 14 Wall Street, New York, New York.

COUNT VI

1. Letter from Garvin P. Kiernan, United States Corporation Company, 60 Wall Street, New York, New York 10005 to John Provine, White & Case, 14 Wall Street, New York, New York 10005, dated October 6, 1969.

2. Letter with enclosures from Hank Amon, White & Case, 14 Wall Street, New York, New York to M. J. Aquilino,

Riggs National Bank, 800 17th Street, Washington, D. C., dated October 21, 1969.

3. Memo with enclosures from Hank Amon, White & Case, 14 Wall Street, New York, New York to M. J. Aquilino, Riggs National Bank of Washington, 800 17th Street, Washington, D.C.

4. Letter from Carl H. Amon, White & Case, 14 Wall Street, New York, New York, to M. J. Aquilino, Riggs National Bank, 800 17th Street, N.W., Washington, D. C. with copies indicated to G. J. Ratcliffe, John G. Davies and John Provine, dated October 30, 1969.

5. A press release from Farley-Manning Associates, 342 Madison Avenue, New York, dated October 29, 1969.

6. Two letters from John G. Davies, NSMC, 345 Park Avenue, New York, New York, to Gregory Caswell, Riggs National Bank, 1520 4th Street, N.W., Washington, D. C., dated October 27, 1969.

7. A letter from Arthur Anderson & Co., 100 E. Broad Street, Columbus, Ohio 43215 to National Student Marketing Corp., 345 Park Avenue, New York, New York, dated October 28, 1969.

8. A telegram dated October 29, 1969 from Alfred Goldstin (sic), Superintendent of Corporations, District of Columbia, to Carl H. Amon, White & Case, 14 Wall Street, New York, New York.

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COUNT VII

1. Letter from John Davies, NSMC, 345 Park Avenue, New York, New York, to M. J. Aquilino, Riggs National Bank, 800 17th Street, N.W., Washington, D. C., dated October 27, 1969.

2. Letter dated October 31, 1969 from Carl H. Amon, White & Case, 14 Wall Street, New York, New York, to M. J. Aquilino, Riggs National Bank of Washington, 800 17th Street, Washington, D. C., with copies indicated to Irving Needleman, John G. Davies and John C. Provine.

3. Telegram from Searching Unit Division of Corporation and State Records, Albany, New York, to Irving Needleman, Jacobs, Peisinger and Parker, 70 Pine Street, New York, New York, dated October 28, 1969.

4. Telegram dated October 27, 1969 from J. P. Donnelly, New York State Corporation Tax Bureau, Albany, New York, to Irving Needleman, Jacobs, Persinger & Parker, 70 Pine Street, New York, New York.

5. Letter from Irving Needleman, Jacobs, Persinger & Parker, 70 Pine Street, New York, New York, to John Provine, White & Case, 14 Wall Street, New York, New York, dated October 30, 1969.

6. Letter from David Hillson, Value Line Investment Survey, 5 East 44th Street, New York, New York, to Cortes W. Randell, NSMC, 345 Park Avenue, New York, New York dated September 4, 1969.

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COUNT VIII

1. Transmission and filing of a definitive proxy from the office of White & Case, 14 Wall Street, New York, New York, to the Securities and Exchange Commission, Washington, D. C., on October 3, 1969.

2. Mailing of a definitive proxy statement to shareholders of NSMC to solicit votes upon the merger.

3. Letter with enclosures from Michael Mathews, White & Case, 14 Wall Street, New York, New York, to Max E. Meyer, Lord, Bissell & Brook, 135 LaSalle St., Chicago, with copies indicated to Davies, Joy, and Randell, dated June 17, 1969.

4. Letter with enclosures from Louis F. Schauer, Lord, Bissell & Brook, 135 South LaSalle Street, Chicago, Illinois, to John Glandon Davies, National Student Marketing Corporation, 345 Park Avenue, New York, New York, dated August 13, 1969.

5. Telephone conversation or conversations between Bernard J. Kurek and John Buck at Pandick Press, 22 Thomas Street, New York, New York, and Donald Jeffers in Chicago, Illinois, late night of August 14, 1969 or morning of August 15, 1969. Refer to Overt Act Number Tw.

6. Letter from Cortes W. Randell at NSMC, 345 Park Avenue, New York, New York, dated October 17, 1969, to all shareholders of Interstate National Corp.

7. Letter from John Davies to Garvin Kiernan, U. S. Corpoartion Company, 60 Wall Street, New York, New

York, with copy indicated to Winthrop Rutherford dated October 28, 1969.

8. Telephone conversation between Marion J. Epley at White & Case, 14 Wall Street, New York, New York, and Anthony Natelli at offices of Peat, Marwick, Mitchell & Co., 1100 Connecticut Avenue, Washington, D. C. the afternoon of October 31, 1969.

9. Telephone call by Winthrop Rutherford at offices of White & Case, 14 Wall Street, New York, New York, to Garvin Kiernan, United States Corporation Company, 60 Wall Street, New York, New York, at about 3:45 P.M., on October 31, 1969.

10. Travel to offices of White & Case, 14 Wall Street, New York, New York, on October 31, 1969 by Cameron Brown, Robert P. Tate, Paul E. Allison, William J. Bach, Jr., Max E. Meyer and Louis F. Schauer, from Chicago, Illinois.

11. Telephone conversation between David Swope at White & Case, 14 Wall Street, New York, New York, and Bernard J. Kurek, at offices of NSMC, Washington, D. C., at about 9:30 A.M. on October 31, 1969.

Government's Bill of Particulars with Letter Amendment

COUNT IX

1. Letter from Paul Powell, Secretary of State, Springfield, Illinois to United States Corporation Co., 60 Wall Street, New York, New York dated November 13, 1969.

2. Letter from Macon Patton, Donaldson, Lufkin & Jenrette, Inc., 140 Broadway, New York, New York to Bruce Ritzenthaler, Ritzenthaler Central West, Box 66, Mundelein, Illinois, dated September 25, 1969.

3. Letter from Cortes W. Randell to Bruce Ritzenthaler, Central West Bus Company, P.O. Box 66, Mundelein, Illinois dated October 28, 1969.

4. Letter from Macon Patton, Donaldson, Lufkin & Jenrette, Inc., 140 Broadway, New York, New York to Allan Mackensey (sic), National Student Marketing Corp., 345 Park Avenue, New York, New York with copies indicated to Joseph Cotrell (sic) and Ritzenthaler.

5. Interstate airplane flight by Bruce Ritzenthaler to attend meeting at board room of NSMC, 345 Park Avenue, New York, New York on October 23, 1969.

6. Letter from John Davies, National Student Marketing Corporation, 345 Park Avenue, New York, New York to M.J. Aquilino, Riggs National Bank, 800 17th Street, Washington D.C. dated November 12, 1969.

7. Telephone conversations between John Provine, White & Case, 14 Wall Street, New York, New York and Macon Patton, Michael Mathews and James Joy on November 5, 1969.

8. Letter from John Davies, NSMC, 345 Park Avenue, New York, New York to Anthony Natelli, Peat, Marwick, Mitchell & Co., 1140 Connecticut Avenue, N.W., Washington, D. C. with copies indicated to B. Kurek and J. Epley dated November 20, 1969.

COUNT X

1. Letter with enclosures from James P. Higgins, 60 Niagara Street, Buffalo, New York to John Provine, White & Case, 14 Wall Street, New York, New York dated November 12, 1969.

2. Letter with enclosures dated November 7, 1969 from Carl H. Amon, White & Case, 14 Wall Street, New York, New York to M.J. Aquilino, Riggs National Bank, 800 17th Street, N.W., Washington, D. C., with copy indicated to John Provine.

3. Telefax dated November 12, 1969 to Abstract Title Division of the Title Guarantee Co., 110 Franklin Street, Buffalo, New York from N.W. State Corporation Tax Bureau, Albany, New York.

4. Letter dated November 12, 1969 from John Davies, NAMC, 345 Park Avenue, New York, New York to M.J. Aquilino, Riggs National Bank, 800 17th Street, Washington, D. C.

5. Letter from Cortes W. Randell, NSMC, 345 Park Avenue, New York, New York to Joseph J. Cottrell, 155 No. Union Road, Williamsville, New York dated October 28, 1969.

6. Letter fom Macon Patton, Donaldson, Lufkin & Jenrette, 140 Broadway, New York, New York to Joseph Cottrell, Cottrell Bus Service, Inc., 12306 Walden Avenue, Buffalo, New York dated September 25, 1969.

7. Telehone conversations between John Provine, at White & Case, 14 Wall Street, New York, New York, and Edwin Cohen and Mr. Lucido of Donaldson, Lufkin & Jenrette, 140 Broadway, New York, New York and Timothy J. May, Patton, Blow, Verrill, Brand & Boggs, 1200 17th Street, N.W., Washington, D. C. on afternoon of November 11, 1969.

COUNT XI

1. Telephone call from Stuart Potter, White & Case, 14 Wall Street, New York, New York to Bernard Kurek, 1100 Connecticut Avenue, Washington, D. C. on November 7, 1969.

2. Letter from John Davies, NSMC, 345 Park Avenue, New York, New York to M.J. Aquilino, Riggs National Bank, 1800 17th Street, Washington, D.C., dated November 11, 1969.

3. Telegram from Martin Dies, Jr., Secretary of State, Austin Texas to Stuart Potter, White & Case, 14 Wall Street, New York, New York dated November 13, 1969.

4. Telegram from Eugene Bunting, Secretary of State, Dover Deleware to Stuart Potter, White & Case, 14 Wall Street, New York, New York, dated November 12, 1969.

5. Letter with enclosure from Marion J. Epley, White & Case, 14 Wall Street, New York, New York to Howard Wolf, Fullbright, Crooker, Freeman, Bates & Jaworski, Bank

of the Southwest Building, Houston, Texas dated November 6, 1969.

6. Flight to Houston, Texas from New York by Randell, Joy, Davies, M.Jay Epley, Douglas Garnett and Stuart Potter to Houston, Texas night of November 4, 1969.

7. Telephone call from James Joy, New York to James Stuckey in Houston, Texas on October 30, 1969.

8. Telephone call from Stuart Potter, White & Case, 14 Wall Street, New York, New York to James Joy on November 3, 1969.

COUNT XII

1. Letter from Cortes W. Randell, per John G. Davies as Attorney in fact, to Donaldson, Lufkin & Jenrette, Inc., 140 Broadway, New York, New York dated December 15, 1969.

2. Confirmation slip dated from Donaldson, Lufkin & Jenrette, 140 Broadway, New York, New York to Enterprise Fund, Inc., City National Bank Bldg., 606 S. Olive Street, Los Angeles, California

3. Confirmation slip dated December 17, 1969 from Donaldson, Lufkin & Jenrette, Inc., 140 Broadway, New York, New York to IDS New Demensions Fund, Inc., Box 534, Minneapolis, Minnesota.

4. Confirmation slip dated December 17, 1969 from Donaldson, Lufkin & Jenrette, Inc., 140 Broadway, New York, New York to Cort Randall (sic), 345 Park Avenue, New York, New York.

5. All jurisdictional bases set forth in Counts One through and including Count Eleven, supra.

COUNT XIII

1. Confirmation for period ending December 31, 1969 from Donaldson, Lufkin & Jenrette, Inc. to Mr. J. F. Joy A/C Robert C. Bushnell, c/o NSMC, 345 Park Avenue, New York, New York 10022.

2. All jurisdictional bases set forth in Counts One through and including Count Eleven, supra.

COUNT XIV

1. All jurisdictional bases set forth in Counts ONE through and including, Count Eleven, supra.

2. Letter from Joel Bernstein NSMC, 345 Park Ave., New York, New York 10022 to M.J. Aquilino, Riggs National Bank, 1800 17th Street, Washington, D.C. dated December 24, 1969.

3. Telegram from Alfred Goldstein, Superintendent of Corporations, Office of Recorder of Deeds, District of Columbia to George K. Crozer IV White & Case, 14 Wall St., New York, New York.

Yours, etc.

PAUL J. CURRAN
United States Attorney

By: Franklin B Velie (JSR)
FRANKLIN B. VELIE
Assistant United States Attorney

Hon. Harold R. Tyler,
United States District Judge
United States Courthouse
Foley Square, New York, N.Y.

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Bierbower & Rockefeller
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Lawler and McGuire
14 E. 69th St.
New York, New York 10021

FBV:dm

September 19, 1974

John Martin, Esq.
1290 Avenue of Americas
New York, NY 10019

Charles Stillman, Esq.
110 E. 59th Street
New York, NY

Re: United States v. Natelli and Scansaroli,
74 Cr. 43

Dear Sirs:

Per my telephone conversations with you on September 19, 1974, this is to confirm that the Government hereby amends the Bill of Particulars, paragraph 14, to include the following:

"In addition, the said amount is materially false and misleading to the extent that it includes earnings relating to unbilled accounts receivable."

On October 1, 1974, the Government will make available to you the exhibits to be employed in the Government's direct case. I invite your cooperation in stipulating the identity and authenticity of those exhibits which were turned over to the Government by defendants Natelli or Scansaroli, or by Peat, Marwick, Mitchell and Co. I have informed Mr. Stillman of the identity of certain of these, and will, prior to October 1, 1974, designate the others so that on October 1, 1974 you may verify that the exhibits are in fact in the form in which they were turned over to the Government.

FBV:dm

John Martin, Esq.
Charles Stillman, Esq. - 2 -

I also invite your cooperation in notifying me prior to trial, and as soon as possible, of objections to summary charts, so that corrections may be made if needed.

Third, I invite your cooperation in stipulating that the proxy statement was required to be filed.

Very truly yours,

PAUL J. CURRAN
United States Attorney

By: Franklin B. Velie
FRANKLIN B. VELIE
Assistant United States Attorney
(212) 264-6570

cc: Hon. Harold R. Tyler, Jr.
United States District Judge
United States Courthouse
Room 1903
Foley Square
New York, NY 10007

HEARING OF AUGUST 20, 1974 RE CHANGE OF PLEA (KELLY)

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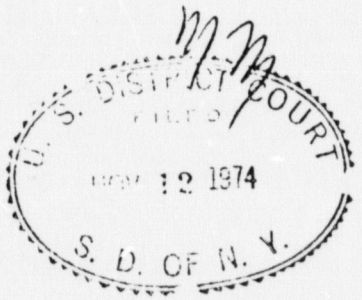

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA :

v. :

74 Cr. 43

DENNIS M. KELLY, :

Defendant. :

- - - - - - - - - - - - - - - - - - -x

B e f o r e:

HON. HAROLD R. TYLER, JR.,
District Judge

New York, New York
August 20, 1974-2:15 p.m.

APPEARANCES:

For the Government:
FRANK VELIE, Esq.,
Assistant United States Attorney

For the Defendant:
THOMAS A. BUTLER, Esq.,

(Case called.)

MR. VELIE: Ready for the government.

MR. BUTLER: Your Honor, I represent Mr. Kelly and I would like to make an application to the Court for a change of plea.

Mr.Kelly has appeared before this Court before your Honor, and pleaded not guilty to the counts in the Indictment 74-CR 43.

I would like to change that plea to a plea of guilty to Count 1 of said indictment.

THE COURT: Mr. Kelly, step forward, if you will, please.

BY THE COURT:

Q Mr. Kelly, I believe you discussed what it means to offer to change your plea from not guilty to guilty toCount 1, the so-called conspiracy in our case, but I must ask you myself.

Do you understand that if this Court were to permit you to change your plea to guilty, that would mean, first of all, that you would be giving up your right to a trial by a jury of your peers, which, as we now plan, will take place or commence some time in about the middle of September of this year, which is less than a month off?

THE DEFENDANT: Yes, your Honor.

Q And you would be giving up also in that respect the opportunity to confront the witnesses whom the government would bring in to testify against you and the others and you would also be able to cross-examine those witnesses with the aid of your counsel, Mr. Butler.

A Yes, your Honor.

Q All of that will be given up if you were to plead guilty here.

A Yes, your Honor, I understand.

Q Now, you know, I think, in America you have a constitutional right to a trial by a jury of your peers.

You understand that?

A Yes, your Honor.

Q Now, you want to give up that right?

A Yes, your Honor, I do.

Q Now, another practical effect of the change of plea, if it is accepted here, would be that any legal defenses or factual defenses and whatnot that you might be able to raise or care to raise would be given up, in effect.

A Yes, your Honor, I understand that also.

Q Or put differently and much more bluntly, if you plead guilty here and your plea is accepted by the Court, all that would remain to be done in your case would be for

the Court to impose sentence upon you at some later stage after hearing from you and your counsel?

A Yes, I understand that.

Q Now, by the by, did anybody tell you what the maximum penalty or punishment might be here in this case under the law if you were to plead guilty to count 1?

A Yes, they did, your Honor.

Q What did they tell you?

A A $10,000 fine and five years in prison.

Q And/or.

A And/or.

Q Well, I believe that is a correct statement of the maximum penalties provided by law for this type of offense. Of course, you understand nobody is telling you that the judge will impose the maximum penalty. That remains to be seen. Indeed, to be perfectly blunt about it, you are gazing upon the judge who presumably under our system would later impose sentence and I am frank to tell you that I haven't the foggiest notion what type of sentence to impose and I really won't know until I read a pre-sentence report and hear you and hear your counsel.

A Yes, your Honor.

Q So if anybody has tried to promise you any favorable sentence, that would be of absolutely no consequence

whatsoever because the judge is telling you he doesn't know himself, you see?

A Yes, your Honor.

Q Now, understanding all of that so far, you are still willing to plead guilty?

A Yes, your Honor.

Q As you know, I am sure Count 1 in very general terms charges you and the other defendants with having engaged in a scheme to sell on behalf of various individuals and firms the stock of National Student Marketing Corporation in violation of the Federal Securities Laws, and briefly, this schem is alleged to have commenced in or about the early part of 1968 and then sort of began to come into full flower later that year.

It is alleged here that you were, beginning in early 1968, at least, one of the salaried officers and employees of NSMC, as it is called in shorthand fashion.

Now, also further than that, it is alleged that you and the others would, in the offer and sale of NSMC common stock, use means of transporation and communication in interstate commerce and by mails in that you would employ devices, schemes and artifices to defraud the purchasers of that stock and to obtain money and

property by means of statements as to the business activities, sales, earnings, prospects, et cetera, of NSMC, which are alleged by the government to be untrue or to omit material facts which were necessary in order to understand the statements or information which was relevant .

Now, going further than that and coming down to some of the specific allegations, count 1 goes on to allege that, for example, in the summer of 1969, you and others knowingly caused false and misleading representations as to the sales and earnings of NSMC for the nine months ending May 31, 1969, to be transmitted to others in this country by mail, telephone and so on.

Further than that, in September, you and others are accused of knowingly causing to be mailed to the shareholders of NSMC and representatives of a firm called Interstate National Corporation and to be filed with the SEC a proxy statement which you and the others knew to contain materially false statements of the sales, earnings and assets of NSMc for the fiscal year ending on August 31, 1968, and for the aforesaid nine month-period ending on May 31, 1969.

Further than that, you and others are accused in the fall of 1969 of knowingly omitting to state in con - nection with sales or offers to sell certain material facts

which are listed on page 7 of the indictment, which is, of course, still part of Count 1.

Now, tell me in your own words-- you admit, I assume, that you were an officer of NSMC in 1968 and 1969, among other times, isn't that so?

A Yes, your Honor.

Q What was your involvement in all this?

A Well, let me read to you the statement that I think will detail it for you.

In connection with Count 1, I participated in two acts. I received a letter from Jim Graham of the Pontiac Division of General Motors, dated April 15, 1969. This concerned a proposal we had made to Pontiac to use the services of National Student Marketing Corporation to reach the youth market.

This letter stated, in effect, that Pontiac was considering our proposal for services in the amount of $1,200,000 and I delivered this letter to Mr. Randall.

Soon thereafter I learned that the letter had been altered to confirm a sale. I knew that the letter as altered was going to the accountants to support the booking of the Pontiac transaction.

I also knew that this information would be reflected in the earnings of NSMC for the fiscal quarter then

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ending.

I did not inform the accountants or anyone else of the alteration of the letter.

In August 1969, I was requested by Mr. Randall to obtain a written confirmation from Eastern Airlines regarding a contract for NSMC services in the amount of $820,000.

At that time I knew that the Pontiac transaction was being written off and that Mr. Randall wanted additional sales or acquisitions to fill the void.

I obtained this confirmation letter from Mr. Mullen of Eastern Airlines, dated August 14, 1974, and delivered it to Mr. Randall.

However, Mr. Mullen had also requested a letter from NSMC to the effect that Eastern Airlines could cancel part or all of the contracted services before December 31, 1969.

This letter, which was proposed,was signed by Mr. Randall and I delivered it to Mr. Mullen.

I subsequently spoke to the accountants relative to the nature of the services to be provided under the Eastern Airlines contract.

I did not inform them of the existance of the

conditional letter which was given to Mr. Mullen, although I had reason to believe that they did not see or know of this letter and had they known, would not have booked the Eastern transaction.

I knew that the Eastern Airlines contract was being booked and as such would be reflected in the reported earnings of NSMC for the nine-month period ending May 31, 1969, which reported earnings would be sent to shareholders of NSMC.

In connection with both transactions, it was my firm belief that both contracts would be performed. However, I did know at the time that they were reflected in the shareholders' report that they were not firm contracts.

Q Is it not true that in the year 1969, for example,you owned or controlled a certain number of shares of NSMC and that some of your shares, at least, if not all, were sold in the year 1969 at a profit to you?

A Yes, your Honor. About 5% of my shares were sold in that period.

Q What was your approximate profit in those transactions in that year while all this was going on?

A Approximately $60,000.

Q Mr. Kelly, I have already touched on this subject.

But I want to return to it again.

Has anybody tried tosuggest some kind of lenient sentence or some other sort of favorable treatment in order to induce you to plead guilty to Count 1 this morning?

A No, your Honor.

Q Conversely, has anybody put pressure upon you or used force or threats in order to get you to plead guilty against your will?

A No, your Honor, no one.

Q In other words, you thought this out very carefully, and of course, consulted very carefully with Mr. Butler and perhaps others, and you have arrived at this decision pretty much on your own, is that true?

A Yes, your Honor.

Q Now, you seem to me to be a man in the prime of health. You indeed seem vigorous, both intellectually and physically. You seem to be absolutely free of any physical ailment or illness, but you tell me, is that correct?

A Yes.

Q Have you had occasion to take any medicine or drug, prescription or non-prescription, within the last three days, to your knowledge?

A No, your Honor.

THE COURT: Are there any questions further that either defense counsel or government counsel would like me to ask Mr. Kelly incident to Rule 11 or indeed for any other reason?

MR. VELIE: No, your Honor.

MR. BUTLER: No,your Honor.

THE COURT: All right, I am satisfied that this is a knowing and understanding event on the part of Mr.Kelly, and under the circumstances of this case, this Court accepts the application which he makes here today to change his plea from not guilty of Count 1 to guilty of that count.

Now, Mr. Kelly, and Mr. Butler, do you waive the detailed reading of Count 1?

MR. BUTLER: Yes, your Honor.

THE COURT: How do you plead to Count 1, the conspiracy count, Mr. Kelly?

THE DEFENDANT: Guilty, your Honor.

THE COURT: Guilty. All right.

As indicated, this Court accepts that plea.

A pre-sentence report will be ordered affecting you. We will not fix any precise or specific date for sentencing now. I think that would be to the agreement of both government counsel and you, Mr. Butler, if we left

the precise date of sentencing open subject to your collective advice to me later.

MR. VELIE: Yes, your Honor.

MR. BUTLER: Your Honor, may we have bail continued?

THE COURT: I assume Mr. Velie will have no objection to that.

MR. VELIE: No objection.

THE COURT: All right, bail as presently fixed will be continued.

I will expect your advices some time later this fall as to a proposed sentence date and I am sure we can agree on something reasonable in that respect.

Now, Mr. Butler, I might as well mention now that it is my practice to offer disclosure of the presentence report to you, your client, and indeed to government counsel. My practical methodology in that department is to invite you to come to my chambers whenever is convenient when that report is complted,so that you and your client can study it and look at it as you see fit at that time.

MR. BUTLER: Thank you very much, your Honor. We would appreciate that.

THE COURT: All right, gentlemen. Good day.

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HEARING OF AUGUST 20, 1974 RE CHANGE OF PLEA (RANDELL)

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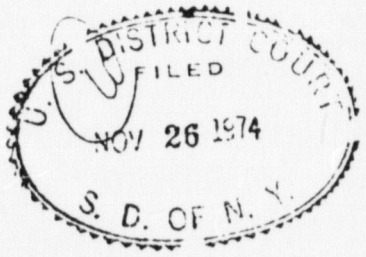
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA :

v. : 74 Cr 43

CORTES W.RANDELL, :

Defendant. :

- - - - - - - - - - - - - - - - - - - -x

B e f o r e:

HON. HAROLD R. TYLER, JR.,
District Judge

New York, New York
August 20, 1974 - 10:00 a.m.

APPEARANCES:

FRANK VELIE, Esq.,
Assistant United States Attorney

FRANCIS X. GROSSI, JR., Esq.,
Attorney for Defendant.

(Case called.)

MR. VELIE: Government is ready.

MR. GROSSI: The defendant is ready, your Honor.

THE COURT: As I understand it, Mr. Randall has an application.

MR. GROSSI: Yes, your Honor.

Mr. Randall at this time would like to withdraw his prior plea in this matter of not guilty to Counts 1, 2, 8 and 11 of the indictment, and is prepared today to enter a plea of guilty to those four counts.

BY THE COURT:

Q Mr. Randall, I am sure that you have covered this in considerable detail with Mr. Grossi and so on, but I must ask you a number of questions in connection with your application here today.

First of all, do you understand that if you were to offer to plead guilty and those pleas of guilty were accepted, that would mean that you would be giving up your right, which is a constitutional right, to a trial by a jury of your peers and you would also be giving up the related rights or opportunities to confront the witnesses whom the United States would bring in to testify against you and to cross examine those witnesses with the aid of counsel?

Do you understand that?

A Yes, sir.

Q And you are willing to give up those rights?

A Yes, sir.

Q Another practical way of looking at this is as follows:

If this Court accepts your offer to change your plea to guilty of certain counts as indicated here, that would mean that all that would remain to be done in your case would be to have sentence imposed upon you at some later date, and you would be giving up all defenses, legal and factual, that you might assert here if you chose to do so, and so on.

A Yes, sir.

Q You are willing to do that?

A Yes, sir.

Q Incidentally, speaking about sentence, did anybody tell you what the maximum penalties might be in respect to these counts to which you offer to plead guilty?

A Yes, sir.

Q What did they tell you?

A 11 years and $40,000 in fines.

Q Count 1, would be a maximum of $10,000 and/or five years.

Counts 2, 8 and 11. I will have to look that up.

Count 2 would carry a maximum of ten years, I believe, is that correct, Mr. Velie?

MR. VELIE: No, your Honor, it is not correct. It is a two-year count and a $10,000 fine. And/or.

THE COURT: 78 FF and 78M.

I beg your pardon. Two years and a maximum penalty of -- fine, rather, of $10,000,did you say?

MR. VELIE: Yes, your Honor, that's my understanding.

THE COURT: Now, 8 and 11 are --

MR. VELIE: Similarly, your Honor, as I understand it --

THE COURT: Those are each two-year counts with a maximum fine of $10,000.

So the way I compute it, the total maximum would be interms of years, Mr. Randall, eleven years and total fines of $40,000.

A Yes, sir.

Q Correct?

A Yes, sir.

Q Of course, no one should be implying or suggesting that this Court would necessarily impose the maximum

in any one of these counts. In fact, I should tell you that under the system, presumably I would be the judge to impose sentence and I haven't the foggiest notion of what the sentence might be here.

We would have to await a pre-sentence report and we would have to await hearing from you and your counsel and so on and so on.

Now, the point we are really trying to make, and this is important, is the judge could go as high as those maximums if he chose to do so and you should assume thatp ossibility, you see.

A Yes, sir.

Q Understanding that, you are still willing to change your plea to guilty of these four counts?

A Yes, sir.

Q Count 1, as you know, charges you and a number of other defendants engaging in a conspiracy beginning in the year 1968 at a time when you were a salaried officer--in fact, I think you were the chief executive officer, were you not, of NSMC and continuing on, most particularly through 1968 and into 1969 and into part of 1970, to sell or cause to be sold shares of NSMC on the basis of communications by the mails and otherwise in interstate commerce and to make statements which were fraudulent in that they

either were misstatements of relevant economic and other corporate facts or they were wilful and knowing omissions of relevant facts which were necessary in order to have one have a reasonable understanding of the financial picture of NSMC.

Indeed, as you know, in count 1, the means partially accuse you and others with certain involvement in all of this.

For example, you are accused of causing certain mailings to the stockholders, certain filings with the SEC, including the annual report for fiscal 1968, and certain reports in 1969 which are alleged to be false, to your knowledge.

Now, of course, Count 2 charges you with the substantive offense of knowingly making false statements in respect to a proxy statement for NSMC which was dated September 27, 1969.

That, of course, among other things, involves the famous footnote which is alleged with some particularity in Count 2 and also the unaudited statement of earnings so-called, for the nine months ending May 31, 1969, in which you and others are accused of misrepresenting the net sales and net earnings figures.

Counts 8 and 11, of course, are so-called

mailing counts in violation of Rule 10(b)(5) and certain provisions of the Securities Acts and here you are charged with certain specific mailings: (1) Count 8 has to do with the sale of some 826,666 shares to the stockholders of Interstate National Corporation, the date being October 31, 1969.

Count 11 involves a transaction or a sale of 137,506 shares to the stockholders of Stuckey & Spear, Inc.

With this brief summary of these four counts, I want to ask you, sir, what was your specific knowledge and involvement in these matters alleged in these counts?

A In order to try and give a full accounting of this matter, I have some prepared notes to assist me.

Q All right.

A From the beginning of National Student Marketing until early 1970, I was the chief executive officer and principal shareholder.

At the close of the fiscal year and at August 31, 1968, there appeared on the financial statements of National Student Marketing, an item known as contracts in progress, or unbilled receivables.

This item reported assets and income of the corporation which was established with the approval and consent of our auditors. The item was predicated on our

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relationship with a large number of clients. It was respresented as income for the year 1968 and that it would be received in the next fiscal year.

With the benefit of hindsight, this accounting concept represented more of an expectation or hope rather than a firm assurance of income.

It did, however, represent a significant portion of the income statement and balance sheet of the parent company, National Student Marketing.

Beginning in early 1969 and thereafter it came to my attention that these contracts in progress would not produce the income that we had previously anticipated.

However, because of repeated delays in removing substantially inactive and discredited contracts, the earning of National Student Marketing were repeatedly overstated. Although I continuously hoped that these contracts would be fruitful, I permitted my unrealistic expectations to seriously affect my judgment, with the result that financial statements of National Student Marketing became inaccurate.

During the period from 1968 through early 1970, acquisitions were effected on the strength of these financial statements.

I also participated in giving these things of

value to two account executives so as to continue a favorable business relationship with their companies.

With respect to Count 2 of the indictment, I participated in the alterationof a supporting financial document, the so-called Pontiac letter, in an effort to increase the strength of a client commitment so that it cold be booked as earnings in the financial statement of February 28, 1969.

Q How about the Eastern Airlines letter?

A Yes, sir. In place of this commitment, another commitment-- excuse me, efforts to have this included in the proxy were unsuccessful. In place of this commitment, another commitment, that is the Eastern Airlines letter, was substituted wherein I participated in failing to provide the auditors with complete information with the esult that certain earnings were recorded in the proxy which may not have been reported had the auditors been given full information.

With respect to Counts 8and 11 of the indictment, I acknowledge that the representatives of Interstate Corporation and Stuckey-Spear, two companies which National Student Marketing acquired, relied upon the proxy statement of National Student Marketing Corporation referred to in Count 2, which I knew contained overstated earnings.

rgre:mg 10

I recognize these errors of my judgment and deeply regret my acts, not only because of the personal consequences to me, but also because of the humiliation and embarrassment to my family and those who have placed their trust in me.

Q At the time in question-- I should say the period in question, when all of this was going on, as you stated, you were the principal stockholder of NSMC.

Now, I believe that a number of shares which you owned or controlled were sold during this period, were they not?

A Yes, sir.

Q And that you recognized a profit from these sales during these years, particularly of 1969 and perhaps into early 1970?

A No, sir. Just 1969.

Q Do you know how much profit you made, roughly, in those transactions involving your shares?

A I sold approximately three million dollars worth, sir.

Q That was not your profit, I take it?

A No, sir.

Q Do you know what your profit was, roughly?

A I could just briefly estimate it. I submitted

approximately $200,000 for the hiring of a person for NSM. I paid another $150,000 for the benefit of NSM. I gave about $300,000 of it away for charitable causes, religious causes.

It would be under two million and with the taxes, it would be considerably less than that, sir. There is a claim of $850,000 against me now by the government which would bring it down to $1 million or under.

Q Profit?

A Yes, sir. These went to my house and a boat and plane, which I have had to subsequently sell because of my law fees.

At this time, sir, I am out of money and have had to borrow to pay my current law fees.

Q Mr. Randall, I take it from what has already been said that no one has attempted to suggest to you some specific lenient sentence or some other favorable treatment in order to induce you to plead guilty; is that so?

A That is correct, sir. Yes, sir.

Q Conversely, I assume that no one has put pressure or used threats or force to get you to come in here and plead guilty against your will and better judgment?

A That is correct, sir.

Q Now, you look to me to be a man in the height

of your powers and in the pink of condition, if you will permit that, but you tell me, as far as you know, are you in good health and free from any disabilities or illnesses today?

A Yes, sir.

Q Have you had any occasion to ingest or take a medicine or drug, prescription or non-prescription, within the last three days, to your knowledge?

MR. GROSSI: Your Honor, we both took Dristan this morning.

A No, sir.

Q Other than Dristan, I will put it.

A No, sir.

Q In other words, you are telling this Court that you thought this thing over carefully and you have made this judgment on your own with, of course, the advice of your friends and family and counsel?

A That is correct, sir.

Q Nobody has pushed you into this or nobody has lured you into this with some kind of a promise?

A That is correct, sir.

THE COURT: Are there any further questions that you, Mr. Grossi, or you, Mr. Velie, would like me to ask incident to Rule 11 or indeed for any other reason?

MR. GROSSI: None for me, your Honor.

MR. VELIE: Your Honor, I think the statement with respect to the conspiracy count leads to the unmistakable inference that the activity was joint activity, which is, of course, the requisite of a conspiracy, but perhaps a simple question to Mr. Randall as to whether he acted with other persons in the matters that he talked about would simply clarify it.

THE COURT: I will be glad to do that.

Q Let me put it this way, Mr. Randall.

I take it that in regard to these matters such as the earnings statements and the proxy statements and the reports to the Commission and the documents; in other words, that such organizations as International and the Stuckey-Spear firm relied upon, there were certain other officers and perhaps employees and outside specialists who were involved in this with you, isn't that so?

A That is correct.

Q For example, isn't it true that you had certain other officers of the companies who are named here as defendants participate in the so-called Pontiac Division letter?

A Ye, sir, that is correct.

Q And in the Eastern Airlines letter?

A Yes, sir.

Q Isn't it true that you cautioned one or more of your co-defendants not to reveal to anyone the conditional letter which you were obliged to sign and send to Eastern Airlines in connection with that deal?

A Yes, sir.

Q In short, this was an arrangement or an agreement which involved not only you, as chief executive officer, but certain other agents and employees of NSM as you call it, or as some others call it, NSMC?

A Thatis correct, sir.

THE COURT: Should that be sufficient, in your judgment, gentlemen?

MR. VELIE: Yes, your Honor.

MR. GROSSI: Your Honor, Mr. Randall informs me that with respect to your question of whether he cautioned an employee with respect to the Eastern Airlines letter, I don't think Mr. Randall either recalls it or -

THE DEFENDANT: I just wanted to take exception to that one point. I discussed and talked about and so forth with Mr. Kelly the Eastern letter. The only one item I wanted to take exception to was just the part about cautioning him not to give it to the accountants. As I recall, it was the other way, but I worked --

Q But you knew the accountants were not going to be told about the conditional letter?

A That is correct.

Q And you on your own did nothing to bring that conditional letter to the attention of the outside accountant?

A Thatis correct, sir.

THE COURT: Allright, I accept your correction.

This Court will accept your application to change your plea to guilty to Counts 1, 2, 8 and 11.

Now, may I ask you, Mr. Randall, and you, Mr. Grossi, do you waive a detailed reading of these particular four counts?

MR. GROSSI: We do, your Honor.

THE DEFENDANT: Yes, sir.

THE COURT: I will ask you, Mr. Randall, how do you plead to Count 1?

THE DEFENDANT: Guilty, your Honor.

THE COURT: Count 2?

THE DEFENDANT: Guilty, your Honor.

THE COURT: Count 8?

THE DEFENDANT: Guilty, your Honor.

THE COURT: And Count 11?

THE DEFENDANT: Guilty, your Honor.

rgre:mg 16

THE COURT: All right, this Court accepts those pleas.

We will order a pre-sentence report affecting you inthis matter. However, I would surmise that counsel would agree that we should not at this point fix a precise sentence date.

MR. GROSSI: That is agreeable, your Honor.

MR. VELIE: That is agreeable to the government.

THE COURT: We will leave that subject open subject to your advices to the Court later as to when you think we should have a sentence date.

MR. GROSSI: Thank you, your Honor.

MR. VELIE: Thank you, your Honor.

There is the matter of continuing bail. We would have no objection to bail being continued.

THE COURT: All right, Mr. Randall's bail as previously fixed will be continued.

THE DEFENDANT: Thank you, your Honor.

MR. GROSSI: Thank you, your Honor.

MR. VELIE: Thank you, your Honor.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- v -	:	74 Cr. 43 (HRT)
ANTHONY M. NATELLI and JOSEPH SCANSAROLI,	:	
Defendants.	:	

GOVERNMENT'S REQUESTS TO CHARGE

The Government respectfully requests the Court to include the following in its instructions to the jury.

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REQUEST NO. 1

Introduction

Mr. Foreman, ladies and gentlemen of the jury, this case is now about to be submitted to you for your decisions on the issues of fact; your decisions on those issues determine whether your verdict as to these defendants is guilty or not guilty.

In making your decisions, you are to adopt an attitude of complete fairness and complete impartiality. You are to appraise the evidence fairly and objectively without any bias or prejudice in favor of or against the government or in favor of or against any defendant.

You, the jury, are the sole and exclusive judges of the facts. You determine the weight of the evidence and the credibility of all witnesses. You decide all conflicts and differences in the evidence. You draw whatever reasonable inferences are justified from the facts as you may find those facts to be.

My function at this point is to give you instructions as to the applicable law, and also to draw your attention to the real issues here on trial. These real issues will be found to be relatively simple.

REQUEST NO. 1 (Continued) -2-

Introduction

Your duty is to accept and follow my instructions as to the law and to apply them to the facts as you may find the facts to be. In determining what the facts are, you as jurors must rely on your own recollection of the testimony and the other evidence; and the other evidence includes, of course, all the exhibits in evidence and all stipulations of counsel for the parties.

In instructing you on the law, I may have occasion to refer to some factual issue in this case. But what I may say to you as to any fact during these instructions is not evidence, and what counsel have said to you in their final arguments or at any other time during the trial is not evidence. It is not binding on you and is not to be taken in place of your own recollection, which is what controls.

In this connection, you will bear in mind that a question put to a witness is never evidence. It is only the answer which is evidence.

The fact that rulings have been made by the Court during the trial is not to be taken as any indication of any views by the Court, by me, as to what your decision should be as to the guilt or innocence of these defendants.

The ruling on objections to evidence and other rulings made by the Court dealt with matters of law with which

REQUEST NO. 1 (Continued) -3-

Introduction

the jury has no concern and these rulings are not to be considered by you in any respect; and in this connection, I should say that counsel not only have the right but they also are under the duty to rise, and present whatever legal objections there may be to the admissibility of evidence. Of course, statements made by counsel in argument as to the admissibility of evidence are not themselves evidence, as you will have appreciated from my remarks a moment ago.

Counsel also have the right and the duty to ask for conferences at the side bar out of the hearing of the jury. These deal, again, with questions of law, and they must be decided, such questions of law, by me the judge, and no inference should be drawn because counsel ask for a conference with the Court at the side bar out of the hearing of the jury.

Our theory has been that if we deal with questions of law out of the hearing of the jury, we avoid the risk that we might distract the jury from its consideration of issues of fact.

I would also remind the jury that when from time to time I asked questions of a witness here on the witness stand, it was solely in an effort or attempt to make

Introduction

something clearer, and certainly is not to be taken as any indication of any opinion by me as to the guilt or innocence of these defendants or as to the credibility of any witness.

The fact that the government is a party and that the prosecution is brought in the name of the United States of America doesn't entitle the government or its witnesses to any greater consideration than that accorded to any other party. At the same time, the government and its witnesses are entitled to no less consideration. All parties, government and individuals alike, stand equal here before the Bar of Justice.

Adapted from Judge Wyatt's charge in United States v. Zane, aff'd. 495 F.2d 683 (2d Cir. 1974).

REQUEST NO. 2

Burden of Proof and Reasonable Doubt

The government has the burden of proof, to prove the charges against the defendants beyond a reasonable doubt. It is a burden that never shifts and it remains with the government throughout the trial. A defendant doesn't have to prove his innocence. On the contrary, he is presumed to be innocent of the accusations contained in the indictment. The presumption of innocence disappears only if and when you are satisfied that the government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

In weighing the evidence to determine whether the proof has been beyond a reasonable doubt, you will consider the quality and the substance of the evidence and not the quantity or the number of witnesses.

You have heard from me and you have heard from counsel the expression "reasonable doubt." A "reasonable doubt" is one founded on reason and arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence. It is a doubt which is substantial and not merely shadowy.

A reasonable doubt is one which appeals to your

reason, your common sense, your experience, your judgment. It is not an excuse to avoid the performance of an unpleasany duty. It is not sympathy for a defendant.

A reasonable doubt is not a vague, speculative, imaginary doubt, but such a doubt as would cause prudent people to hesitate before acting in matters of importance to themselves.

If you are confronted with an important decision and after reviewing all the factors that are pertinent, you are beset with uncertainty, with doubt, and unsure of your judgment, then you have a reasonable doubt, and, conversely, taking into account all the elements that pertain to the problem, if you have no reserve about your judgment, then you have no reasonable doubt.

Now, members of the jury, proof beyond a reasonable doubt doesn't mean proof to a positive certainty nor does it mean proof beyond all possible doubt. If that were the rule, few men or women, however guilty, would ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which is not capable of being proved with mathematical certainty. In accordance, the law in a

REQUEST NO. 2 -3

Burden of Proof

criminal case is that it is sufficient that the guilt of a defendant be established beyond a reasonable doubt and not beyond all possible doubt.

From Judge Wyatt's charge in United States v. Zane, (Trial Tr. pp. 4067 ff.), aff'd 495 F.2d 683 (2d Cir. 1974).

REQUEST NO. 3

Defendants

The Indictment charges two defendants, Anthony M. Natelli and Joseph Scansaroli, with criminal responsibility for financial statements in a proxy statement charged to be false and misleading, and filed with the Securities and Exchange Commission. You must consider the guilt or innocence of each defendant separately. You need not consider in any way the guilt or innocence of any other person, as no other person's guilt or innocence is before you for decision.

Aggravation a Recitation on both as to part of guilt, etc.

REQUEST NO. 4

Purpose of the Securities Laws

Now, as further background material, I refer to some of the securities laws. The Securities and Exchange Commission, to which I may sometimes refer as the Commission, or the SEC, is an independent, bi-partisan agency of the United States Government. It was created by statute in 1934. The laws administered by the Commission relate in general to the field of securities and finance, and they seek to provide protection for the public in their securities transactions.

So far as this case is concerned, the principal law administered by the SEC is called the Securities Exchange Act of 1934.

The 1934 Act, together with rules of the Commission provides that a company which has filed a registration statement with the SEC must thereafter file with the Commission such other documents as the rules of the SEC may prescribe. NSMC has filed a registration statement and is thus a "registered company" and required to file documents. The SEC has required that all proxy statements of registered companies be filed with it.

REQUEST NO. 4 (Cont'd.) -2-

Purpose of the Securities Laws

As you have probably realized already, the purpose of this requirement is to have on file, available to the public, information about the issuer of securities which is as current and as up to date as reasonably possible.

There is a provision in the applicable law which reads in relevant part as follows:

"...any person who wilfully and knowingly makes or causes to be made any statement in any...document required to be filed under this title, or any rule or regulation thereunder...which statement was false and misleading with respect to any material fact [is guilty of an offense]."

The charge in the indictment is laid under the law which you have just heard.

In substance, the indictment charges the defendants with preparing and filing a false and misleading proxy statement in violation of law.

As we have seen, a proxy statement of NSMC was filed with the SEC, and a certified copy of it is Government Exhibit 25 in evidence.

The Indictment charges that the proxy statement was false and misleading in two regards:

REQUEST NO. 4 (Cont'd.) -3-

Purpose of the Securities Laws

First, the Indictment charges that the defendants omitted to disclose that over $1 million of NSMC's 1968 sales had been written off, but that instead the defendants subtracted the greater part of the losses from pooled companies, thus overstating NSMC's sales and earnings and understating those of the pooled companies.

Second, the Indictment charges that the defendants overstated NSMC's sales and earnings for the first nine months of 1969, omitting to disclose that NSMC had no earnings at all for that period.

I instruct you that if you find that the proxy statement was false in either regard, it is sufficient. The Government is not required to prove that the proxy statement was false with respect to both 1968 and the first nine months of 1969.

Adapted from Judge Wyatt's charges in United States v. Zane, (Trial Tr. pp. 4070-72), aff'd 495 F.2d 683 (2d Cir. 1974) and in United States v. Wolfson (Trial Tr. pp. 2017ff).

United States v. Lennon, 246 F.2d 24, 27 (2d Cir. 1957); United States v. Otto, 54 F.2d 277, 279 (2d Cir. 1931).

REQUEST NO. 5

The Issue

As I said before, my job is to explain points of law and to focus your attention on the real issue.

Despite the volume of the testimony, the number of documents, and what may seem to be complicated transactions, I believe you will find that in determining the guilt or innocence of each defendant you must turn to this simple question:

Did the defendant, in the proxy statement, fairly present the financial position and the financial operations of NSMC for 1968 and the first nine months of 1969?

If you answer this question "No" and if you further find the essential elements later to be explained to you as to the offense charged, then you must find the defendant guilty.

If you answer the question yes, then you must find the defendant not guilty.

Adapted from the charge of Judge Wyatt in United States v. Zane, aff'd 495 F.2d 683 (2d Cir. 1974). See also Judge Mansfield's charge in United States v. Simon (Trial Tr. p. 3982), aff'd 425 F.2d 796 (2d Cir. 1969).

REQUEST NO. 6

Elements of the Offense

In order for you to convict either defendant under this charge, the government must establish beyond a reasonable doubt these essential elements:

1. That NSMC filed a proxy statement with the SEC which was required by law to be so filed.

There seems to be little or no dispute about this element.

2. That some statement made in the proxy statement was false or misleading as to a material fact. Specifically, one of the two statements described in the indictment. [Please read paragraph 3 and 4 of Count Two].

3. That the defendant made or caused to be made the false or misleading statement; and

4. That the defendant acted wilfully and knowingly.

I will now discuss each of the elements in dispute.

REQUEST NO. 7

False and Misleading Statement

A statement is false if it is untrue. A statement is misleading if it omits facts which are necessary to portray a true picture of the facts. A statement is false or misleading if what is stated conceals or distorts a material fact so that the ommission, the failure to disclose, creates or fosters a misapprehension as to the true state of facts.

Sometimes a half truth is no better than an outright falsehood. Fraud may be effected by half truths calculated to deceive and mislead.

A statement, although literally true, is nevertheless false if it would create a false impression of the true state of affairs when interpreted by those whom it was calculated to influence.

While ordinarily a person, knowing certain facts, such as we might in our everyday life, is under no legal obligation to reveal them, and he or she may keep them to themselves, there are circumstances where a person is not entitled to do that. For example, where a person represents that a particular fact or set of facts exists, and at the same time wilfully, knowingly and intentionally fails to reveal other revelant and material facts concerning that representation, which

REQUEST NO. 7 (Cont'd.) -2-

False and Misleading Statement

would place the state of affairs in quite a different posture if those other facts were known, he may have an obligation to disclose the other material facts so as to avoid deceiving the person to whom the statement is made. For example, defendants, having stated in footnote (d) of the proxy statement that NSMC's 1968 sales were $4.9 million, concededly omitted to disclose that they knew over $1 million of those sales had been written off. The Government contends that this is a half truth, and no better than a lie. Defendants contend the matter was immaterial and did not have to be disclosed. It is for you to decide.

Adapted from Judge Wyatt's charge in United States v. Zane (Trial Tr. pp. 4083ff), aff'd 495 F.2d 683 (2d Cir. 1974).

REQUEST NO. 8

Materiality

A material fact is a fact to which an average reasonably prudent person would attach importance in determining a course of conduct to be taken or followed upon learning of the fact, such as deciding whether or not to buy shares of stock, or to trade his company or business in exchange for stock.

From Judge Wyatt's charge in
United States v. Wolfson,
(Trial Tr. p. 2022).

REQUEST NO. 9

Reliance on the Misrepresentations Not Required

It is not necessary for the Government to establish that anyone relied on, or suffered damage as a consequence of, any false statements or omissions of material facts. It is enough that false statements or statements omitting material facts were made in the expectation that they would be relied upon. You need not speculate on the absence in the case of proof that people relied on the statements, or lost money. Because of this rule of law I have not permitted the Government to prove or the defendants to disprove, the proposition that people relied, and lost money. My ruling explains the absence of proof in this area.

N. Sims Organ & Co. v. Securities and Exchange Commission, 293 F.2d 78, 80 n. (2d Cir. 1961);

Hughes v. Securities and Exchange Commission, 174 F.2d 969, 973-4 (D.C. Cir. 1949);

United States v. Brown, 79 F.2d 321, 324 (2d Cir. 1935).

REQUEST NO. 10

Aiding and Abetting

Now, another element of the offense charged is that a defendant have made or caused to be made the false and misleading material statement. This seems an appropriate place to mention that with respect to the charge in this Indictment, the government also relies on Section 2 of Title 18 of the United States Code, which is usually called the aiding and abetting statute, and which reads as follows:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

"(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

This means that not only is the person who commits an illegal act, the person usually called a principal, guilty, but anyone who aids and abets in the commission of the act is likewise guilty of committing that illegal act.

In order to find that a defendant aided or abetted another to commit the offenses charged in this count, you must find that the defendant in some way

REQUEST NO. 10 (Continued) -2

Aiding and Abetting

associated himself with the criminal venture of preparing and filing a false or misleading report; that he participated in it as something which he wished to bring about; and that he by his act or acts endeavored to make it succeed.

Participation by a defendant in a criminal venture may be shown by any act designed to promote or further the criminal venture, even of relatively slight importance, which you find was committed by the defendant. But to find a defendant guilty of aiding and abetting you must find something more than mere knowledge on his part that the crime was being committed, since a mere spectator at a crime is not a participant.

It is not necessary, however, to find that he himself did any of the acts, since participation in the crime can for example, be shown if you find that he aided or counselled another to commit the crime.

In determining whether a defendant participated in a criminal venture, you may consider whether that defendant had any stake in the venture or motive to aid the venture.

See generally United States v. Umans, 368 F.2d 725 (2d Cir. 1966).

REQUEST NO. 11

Knowledge and Wilfulness

To do an act knowingly means to do it voluntarily and intentionally and not because of mistake or inadvertence or some other innocent reason.

To do an act wilfully means to do it knowingly and deliberately and with a bad purpose or motive. However, it is not necessary for you to ~~ding~~ find that the defendant knew that he was breaking some specific or particular law.

In determining whether a defendant has acted knowingly and wilfully, the law is that the Government may rest its burden of proof by proving that a defendant deliberately closed his eyes to facts he had a duty to see, or that the defendant recklessly stated as facts things of which he was ignorant. There are many situations where one who makes representations to the public without knowing whether they are true or false cannot be regarded as innocent, if he knows that his representation will be taken by the public as being backed by his knowledge of its truthfulness.

An example from the case will make this matter of wilfulness concrete for you. There has been a great deal of argument between the parties as to the substitution of the Eastern Airlines "sale" for the uncollectible

REQUEST NO. 11 (Continued) -2

Knowledge and Wilfulness

Pontiac "sale" which occurred at the Pandick Press. The defendants argue that they were deceived by NSMC personnel, and believed the Eastern Airlines sale to be a real one. They thus argue that they did not act wilfully with respect to non-disclosure of the uncollectibility of the Eastern Airlines contract. The Government contends that while the NSMC people didn't tell the defendants the entire story, sufficient facts were available in the circumstances, such as the fact that it was 3:00 A.M. on the morning the statements were being prepared, no one had previously mentioned this "sale" and that the same salesman Dennis Kelly was responsible for both the Eastern sale and the uncollectible Pontiac sale, so that the defendants knew without having to be told that the Eastern "sale" was uncollectible. Which inference you choose is up to you.

Adapted from Judge Mansfield's charge in United States v. Simon, (Trial Tr. pp. 3977-78), aff'd 425 F.2d 796 (2d Cir. 1969). See also United States v. Benjamin 328 F.2d 854, 862 (2d Cir. 1964); Bentel v. United States, 13 F.2d 327, 329 (2d Cir), cert denied 273 U.S. 713 (1926).

REQUEST NO. 12

Departure from Accepted Accounting Principles

Another circumstance that you are entitled to consider and weigh, in determining whether or not a defendant acted knowingly and with intent to defraud, is whether he followed or deviated from generally accepted accounting standards and accounting principles in effect at the time when NSMC's financial statements were prepared and distributed.

The government contends that defendants deviated from such standard principles and practices. The government offered opinion testimony and other proof with respect to such generally accepted standards and principles. That proof, of course, is not conclusive on the issue of a defendant's good faith and intention. Whether or not a defendant's conduct was in accord with such standards and principles does not itself answer the question of whether the defendant was guilty or not guilty. The weight and credibility to be extended by you to such proof, and its persuasiveness, must depend, among other things, on how authoritative you find the precedents and the teachings relied upon, the extent to which they contemplate, deal with, and apply to the type of circumstances found by you to have existed here, and the weight you give to expert opinion evidence and other evidence.

REQUEST NO. 12 (cont'd) - 2 -

Departure from Accepted Accounting Principles

Proof that a defendant, in preparing financial statements departed from such standards, or participated in the preparation or approval of a financial statement that did not fairly present NSMC's financial position and results of its operations in accordance with generally accepted accounting standards and accounting principles, is evidence, not necessarily conclusive, that the defendant did not act honestly and in good faith, and that statements contrary to such standards and principles may have been materially false or misleading. On the other hand, proof that the defendant did act in accordance with such generally accepted accounting standards and accounting principles is evidence which may be persuasive but not necessarily conclusive that he acted in good faith, and that the facts as certified were not materially false or misleading.

From Judge Mansfield's charge in United States v. Simon, (Trial Tr. pp. 3978-81), aff'd 425 F. 2d 796 (2d Cir. 1969).

REQUEST NO. 13

Intent

Intent involves the state of a man's mind and that is an issue of fact, as the expression goes, as much as the state of his digestion. The issue of whether the defendants intended to prepare false and misleading financial statements is one which you the jury are called upon to decide. Medical science hasn't yet devised any instrument by which we can gauge a person's intent. Rarely is direct evidence available to establish the state of a person's mind. Occasionally a person will write a letter or make a statement which does set forth his state of mind or intent. The state of a man's mind is generally inferred from what he says or does; his words, his actions, his conduct may permit an inference as to what his state of mind was.

Generally, the proof offered as to intent is of objective facts and circumstances from which you, in terms of your common experience, can logically conclude the ultimate fact, that is, his intent. Accordingly, consideration of all the facts and circumstances may permit a reasonable inference with respect to the defendant's intention at the time he prepared the financial statements in the proxy statement.

REQUEST NO. 14

Direct and Circumstantial Evidence

Now, the law recognizes two types of evidence: direct evidence and circumstantial evidence. Direct evidence is where a person testifies from what he saw or heard, what he knows of his own knowledge. If believed, such testimony proves the truth of the matter without requiring any inference.

Circumstantial evidence is where proof is given of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

We sometimes use an example from the old story of Robinson Crusoe.

You remember that Crusoe one day saw footprints on the sand of the beach. He didn't see any man. But from the circumstantial evidence, the footprints, he drew the logical inference that a man had walked on the beach.

Circumstantial evidence if believed is of no less value than direct evidence.

(Adapted from the charge of Judge Wyatt in United States v. Zane (Trial Tr. pp. 4115-16), aff'd 495 F.2d 683 (2d Cir. 1974).

REQUEST NO. 14 (Continued) -2

Direct and Circumstantial Evidence

As already indicated, you are likely to rely on circumstantial evidence in ascertaining a person's intent. Proof of some individual circumstances in your view may not, of itself, show, with any degree of force the intent of a person. However, the sum of circumstances may, in your judgment, be greater than any of them alone. It is for you to weigh all of the circumstances and to decide the matter from all of the evidence.

Adapted from Opinion of Learned Hand, United States v. White, 124 F.2d 181 (2d Cir. 1941).

REQUEST NO. 15

Inferences

From time to time during this trial you have heard the word "inference" used. You have been asked to draw inferences from pieces of evidence before you and from the testimony of witnesses. The term "inference" simply describes a process of reasoning that is familiar to all of us. When we start with one fact or a set of facts already proved and deduce from those a logical conclusion, we draw an inference. You have to draw inferences daily in your own lives.

The decision as to whether to draw or to reject a requested inference -- and there were inferences requested by counsel for both sides in their summations -- rests entirely in your sound judgment.

You are permitted to arrive at your findings as to disputed questions of fact by way of inferences as well as by direct proof. However, an inference must not be just a mere supposition or a rambling choice between a couple of far-out possibilities. It must be a well-considered conclusion warranted by reason and common sense.

From Judge Mansfield's charge in United States v. Simon, (Trial Tr. pp. 4074-75), aff'd 425 F.2d 796 (2d Cir. 1969).

REQUEST NO. 16

Intent to Defraud Not Necessary

In deliberating you are not to be concerned about whether the defendants intended to commit a fraud on the stockholders of NSMC or anyone else. That issue is not present in the crime with which they are here charged. Thus, to find either defendant guilty, you do not have to find he intended to defraud anyone. No amount of honest belief on the part of a defendant that no one will suffer any loss will excuse fraudulent actions by him or false representations by him which may subject others to the possibility of such losses.

Frank v. United States, 220 F. 2d ~~259~~ 559, 564 (10th Cir. 1955);

Forshay v. United States, 68 F. 2d 205 (8th Cir. 1934), cert. denied 291 U. S. 674;

Pandolfo v. United States, 286 Fed. 8 (7th Cir. 1922), cert. denied, 261 U. S. 621 (1923).

REQUEST NO. 17

Motive

While the government is not required to prove motive in order to establish guilt, you are entitled to consider evidence of motive or lack of motive in determining a defendant's intent. The reason for this is that normally it is unlikely that a person will wilfully or deliberately violate a law unless he has some motive for doing so.

A scheme to defraud is often motivated by a desire for gain. In this instance, however, the defendants did not stand to realize any financial gain as a result of the financial statements in the proxy statement. Neither of the defendants would have received increased remuneration or increased participation in fees as a result of preparing the proxy statement in one form rather than another.

The government, however, contends that the defendants were motivated by the desire to conceal their past negligence in certifying NSMC's 1968 statements, which statements, according to the government, the defendants had learned were wholly inaccurate some months after they were prepared.

REQUEST NO. 17 (Continued) -2

Motive

The government asserts that because this prior negligence could have exposed the defendants to civil liability if it came to light, or might have resulted in loss of their licenses to practice as accountants, the defendants prepared a proxy statement that was fraudulent and misleading to conceal the 1968 write-offs, in the hope that NSMC might acquire additional subsidiaries and thus weather its difficulties without their negligence being exposed. Defendants, on the other hand, contend that they made appropriate professional judgments, and therefore had no motive to cover up.

See United States v. Simon, 425 F.2d 796, 808ff. (2d Cir. 1969) Friendly, C.J.)

REQUEST NO. 18

Accomplice Testimony

The government has called as a witness a witness who openly admitted his involvement in the offenses here charged or related offenses. In the eyes of the law, he is an accomplice.

In the prosecution and detection of crime the government of necessity is frequently compelled to rely upon the testimony of accomplices or of persons with criminal records. Often it has no choice in the matter. The government must take the witnesses as to the transactions as they are.

An accomplice doesn't become incompetent as a witness because of participation in the criminal act charged. If accomplices couldn't be used, in many instances it would be difficult to detect and prosecute wrongdoers.

Frequently it happens that only those who participated have evidence which is relevant and important in a case.

There is no requirement in the federal courts that the testimony of an accomplice be corroborated. A conviction may rest upon uncorroborated testimony of an accompliace if you find it credible and believable.

REQUEST NO. 18 (Cont'd) -2-

Accomplice Testimony

You will understand, however, that in this case the government does claim corroboration as to various portions of the testimony of the accomplice witness and claims such corroboration from independent proof by other witnesses who weren't accomplices. The fact that a government witness is an accomplice may be considered by you as bearing upon his credibility. However, it doesn't follow that because a person has acknowledged participation in a crime or is an accomplice or has a criminal record that he is not capable of giving a truthful version of what occurred. His testimony, however, should be viewed with great caution and scrutinized carefully.

You will consider whether his testimony was inspired by hostility to a defendant, by any motive of self-interest, personal advantage, so that he gave false or colored testimony against him. You will consider whether the testimony of the witness was a fabrication induced by a belief that he will receive favorable consideration in connection with offenses to which he has pleaded guilty or of which he is guilty. You should

REQUEST NO. 18 (Cont'd) -3-

Accomplice Testimony

consider whether the witness bared himself publicly before you, made a clean breast of his wrongdoing and told the truth. In short, has he decided, after being caught, to come clean and tell the truth.

If you find that the testimony of an accomplice was deliberately untruthful, you should reject it. On the other hand, if upon a cautious and careful examination you are satisfied that the witness has given a truthful account of what occurred and that the government has sustained its burden of proof in all other respects as outlined in these instructions, then you have sufficient proof upon which to bring in a verdict of guilty.

From Judge Wyatt's charge in United States v. Zane, (Trial Tr. pp. 4118-21), aff'd 495 F.2d 683 (2d Cir. 1974).

REQUEST NO. 19

Testimony of a Defendant (Requested if a Defendant Testifies)

The law permits but doesn't require a defendant to testify in his own behalf. The defendants have each taken the stand and testified. Naturally, a defendant has a deep personal interest in the result of his prosecution. In fact, it seems clear that he has the greatest interest of all. Interest creates a motive for false testimony. The greater the interest, the greater the motive, and the interest of a defendant in the result of his trial is of a character possessed by no other witness. In appraising his credibility, you may take the fact of interest into consideration. However, it by no means follows that simply because a person has a vital interest in the result that he is not capable of giving a straight-forward or truthful account of events. It is for you to decide to what extent, if at all, his interest has affected or colored his testimony.

From Judge Wyatt's charge in United States v. Zane, (Trial Tr. Pp. 4125-26), aff'd 495 F.2d 683 (2d Cir. 1974).

REQUEST NO. 20

Charts and Summary Evidence

During the trial there has been admitted in evidence certain exhibits which we have referred to as charts, schedules, or summaries. These exhibits are not themselves independent proof; they purport to be only pictorial or visual representations or resumes of information or data as set forth in the testimony of a witness or in documents that are exhibits in evidence.

If the information contained in the exhibits or in the testimony is then converted into a visual form or a pictorial form, and the chart or the summary is marked as an exhibit, the chart or the summary does not have an independent value as proof because it is only based upon the testimony or the exhibits. It is visual aid, just to help you understand what is in the exhibits and what is in the testimony, so therefore, you will understand that charts and schedules and summaries are not by themselves independent evidence.

It is for you to decide whether the charts, schedules or summaries correctly present the data set forth in the testimony and exhibits upon which they are based.

REQUEST NO. 20 (Continued) -2

Charts and Summary Evidence

Therefore, you are to give no greater consideration to these charts, schedules or summaries than you would give to the testimony and the exhibits upon which they are based.

With this instruction in mind, you are entitled to consider the charts, schedules and summaries received in evidence if you find that they are of assistance to you in analyzing the evidence and in understanding the evidence.

From Judge Herlands' charge in United States v. Dardi, (Trial Tr. pp. 26435-6), aff'd 330 F.2d 316 (2d Cir. 1964).

REQUEST NO. 21

Punishment No Concern of Jury

Under your oaths as jurors you cannot allow a consideration of the punishment which could be imposed upon a defendant in the event of conviction to enter into your deliberations or to influence your judgment. The duty of imposing sentence rests entirely and exclusively with the Court. There is no information before you as to what sentencing alternatives are available to this Court, and for you to even think about the matter of possible sentence, in the event of conviction, would be idle speculation and contrary to your oath.

Adapted from Judge Mansfield's charge in United States v. Simon, (Trial Tr. p. 4089), aff'd, 425 F.2d 796 (2d Cir. 1969).

REQUEST NO. 22

Sympathy; Oath as Jurors

Under your oath as jurors you are not to be swayed by sympathy. You are to be guided solely by the evidence in the case and the crucial hard core question that you must ask yourselves as you sift through this evidence is, Where do you find the truth? This is a quest for the truth, that's what a trial is. It's not a battle of wits. It is not a contest of salesmanship and it is not a contest in personalities. The only triumph in any case, whether it be civil or criminal, is whether or not the truth has triumphed. If it has, then justice has been done. If not, justice will not have been done. You are to determine the guilt or innocence of each defendant solely on the basis of the evidence and subject to the law as I have charged you.

From the charge of Judge Irving R. Kaufman sitting as a District Judge in United States v. Davis, 64 Cr. 388, at pp. 15a-16a of appellant's appendix. Decision aff'd., 353 F. 2d 614 (2d Cir. 1965), cert. denied, 384 U. S. 953 (1966).

REQUEST NO. 22 (Cont'd) - 2 -

Sympathy; Oath as Jurors

The most important part of this case is the part which you now, as jurors, are about to play because it is for you and you alone to decide whether each defendant is guilty or not guilty of the crimes charged. I know you will try the issues that have been presented to you according to the oath which you have taken as jurors in which you promised that you would well and truly try the issues joined in this case and a true verdict render. And I suggest to you that if you follow that oath, and try the issues without combining your thinking with any emotions, you will arrive at a just verdict. It must be clear to you that once you get into an emotional state and let fear or prejudice or bias or sympathy interfere with your thinking, then you don't arrive at a true and just verdict.

Adapted from the charge of
Judge Thomas F. Murphy in
United States v. Umans, 65 Cr.
264, aff'd 368 F. 2d 725
(2d Cir. 1966).

REQUEST NO. 22 (Cont'd) - 3 -

Sympathy; Oath as Jurors

The charges here, ladies and gentlemen, are most serious. The just determination of this case is important to the government and to the public. It is equally important to each of these defendants. Under your oath as jurors, you must decide the case without fear or favor and solely as I have stated in any number of times, in accordance with the evidence and the law.

If the government has failed to carry its burden as to either defendant, your sworn duty is to bring in a verdict of not guilty as to that defendant. If the government has carried its burden as to either defendant, you must not flinch from your sworn duty, but you must bring in a verdict of guilty as to that defendant.

From Judge Wyatt's charge in United States v. Zane (Trial Tr. 4127-28), aff'd 495 F. 2d 683 (2d Cir. 1974).

REQUEST NO. 23

The Government respectfully requests the Court to include the following standard charges in its charge to the jury:

a. Presumption of Innocence.

b. Credibility of Witnesses.

c. Indictment Not Evidence.

d. Verdict of Guilt or Innocence must be unanimous.

e. Right to see the Indictment and Exhibits and have Testimony read.

f. Expert Testimony

Respectfully submitted,

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GOVERNMENT'S SUPPLEMENTAL REQUEST TO CHARGE NO. 1

Government's Contentions of Fact

The Government's first contention is that the defendants negligently and improperly permitted NSMC to add $1.7 million of sales to the results for the fiscal year ended August 31, 1968, two months after that fiscal year had closed. The Government points to the testimony of Mr. Kurek, Mr. Oberlander and Mr. Johnston and to the exhibits in evidence which show that these sales first surfaced in Mid-October; that they were not legal, binding contracts; that the salesmen on these sales were not even entitled to their commissions yet; and that indeed, in defendant Scansaroli's words, the situation with these sales was "touch and go" as NSMC might even lose the business on them at that late date.

Despite the fact that these sales meant the difference between a profit and loss for fiscal 1968, the defendants' audit was, the Government contends, unprofessional and lax. The Government points to the exhibits and Mr. Scansaroli's own testimony indicating that, in attempting to confirm the verbal commitments, Scansaroli often had no idea whom he was talking to and failed to record what it was that he had done. As to the supposedly written

commitment from Syntex, the Government points to evidence that Mr. Scansaroli apparently never even read it, and so did not see that it was not a commitment for the 1968 period at all and that it contained a money-back guarantee. The Government further points to Mr. Scansaroli's admission that, in booking the greater part of these sales as of 1968 on the ground that that was when NSMC had done the work, Mr. Scansaroli simply "assumed" that the work had in fact been done by NSMC in the 1968 period. And as evidence of Mr. Natelli's laxness, the Government further points to the fact that Natelli, in exercising overall supervision and direction of the audit, claims to have been unaware of all these laxities on the part of Mr. Scansaroli.

The Government contrasts the defendants' performance in 1968 with the audit work performed by Mr. Johnston in 1969, where there were written confirmations and the confirmation process was kept in Mr. Johnston's direct control.

The Government contends that within a few months of the 1968 audit, a million dollars of these $1.7 million in unbilled accounts receivable that were booked in 1968 had been written off as no good, and that most of the balance was known to be uncollectible. This leads to

the Government's next important contention, which is that the defendants were concerned that, because of these very large write-offs, they might lose their accounting certificates and their careers might be at stake. The Government points to the testimony of Mr. Kurek as to discussions in which the defendants voiced these concerns and to Government Exhibit 14 -- Mr. Kurek's memorandum of June 3, 1969 -- which records one of these conversations on the day it occurred. The Government also points to Natelli's own admission on the stand that these write-offs were "professionally embarassing."

This leads to the Government's ultimate contention, which is that, in this context, the defendants carefully prepared the proxy statement so as to hide the fact of these write-offs. Specifically, the Government contends that the proxy statement was false both in what it stated with respect to the company's history for 1968 and in what it stated with respect to the company's position for the nine-month period ending May, 1969.

The first of these -- the proxy statements respecting 1968 -- is the subject of Paragraph 3 of the relevant

Count of the indictment, where it is charged that the proxy note which purports to reconcile the 1968 figures given in the proxy with those that appeared after the original audit is false and misleading, in that fails to disclose that over $1 million dollars in sales -- or more than 20% of all sales originally recorded as of 1968 -- had been written-off. The Government contends that the defendants not only did not affirmatively make this fact known, but that they positively hid it by improperly subtracting the resulting losses from pooled companies, thus understating the sales of the pooled companies and overstating those of NSMC.

In this connection, the Government points to proof adduced on the testimony of Mr. Kurek, Mr. Buck and Mr. Dingwall, that it was wholly improper accounting to subtract NSMC's lossess from the sales of other companies. Furthermore, the Government contends that the defendants cannot excuse their behavior by relying on the alleged tax credit. The Government argues that the tax credit was itself a phony, and that if it ever did exist, proper accounting still required disclosure of the write-offs before they and the tax credit could be netted together.

The Government points to APB #9, which requires that all of the components of adjustments such as the ones made here be disclosed, including the write-offs.

The Government contends that this evidence of improper and irregular accounting is powerful evidence of intent to deceive.

The second portion of the proxy statement which the Government contends is false is described in Paragraph 4 of Count 2 of the indictment. This is the financial statement of the period ending May 31, 1969. The indictment charges that this statement was false in that it overstated sales by over $800,000 and in that it reported substantial earnings when there were no earnings at all.

The Government has summarized on Chart 65-15 sales totalling over $840,000, which it contends the defendants had no business reporting as components of earnings for that period. These included $340,000 worth of sales which Mr. Scansaroli and Mr. Obetlander had noted as being no good, and over $500,000 of the Eastern commitment. The Government contends that the defendants knew that the Eastern commitment was no good from the fact that it first appeared in the wee hours at the printer's in time

to replace the write-off of the Pontiac commitment; and that it was suspect in addition because it represented the third time the company had attempted to add earnings to a period which had long been closed.

The Government further contends that there were no earnings at all from the testimony of Mr. Dingwall, who calculated that without the unbilled accounts receivable the May figures would have shown a loss. The Government contends that it was false and misleading for the defendants to put out the May figures without disclosure of the fact that, of $3.3 million of unbilled accounts receivable previously booked, $2 million had been written off.

The Government contends that it is no defense to all this for the defendants to claim that they cleared the non-disclosures with Mr. Otkiss, since Mr. Otkiss was never given the true or complete facts. In effect, the Government contends that Mr. Natelli deceived Mr. Otkiss. Similarly, the Government contends that the comfort letter is no defense, as (1) any credit for the disclosures in it belongs to Mr. Colonna and Mr. Johnston; (2) the defendants did not add further facts known to them required to make that comfort letter true and complete; and (3)

the defendants, the Government contends, failed to tell the true facts to PMM's lawyer and professional practices committee. Instead, the Government contends, the defendants deceived them into believing that the adjustments were the results of "honest mistakes" made by the company. It was, the Government argues, just further concealment -- part of the defendants' scheme to deceive.

Respectfully submitted,

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- Of Counsel -

GOVERNMENT'S SUPPLEMENTAL
REQUEST TO CHARGE NO. 2

No Inference to be Drawn from
Failure to Call Witness Equally
Available to Both Parties

In summation, defense counsel argued (Tr. 2200-01) that if the Eastern and Pontiac commitments were really fraudulent, why had the Government not called Mr. Graham from Pontiac, Mr. Mullen from Eastern, and/or Randell, Bushnell and Kelly. The obvious, indeed sole implication was that the jury should draw an inference adverse to the Government from its failure to call these witnesses, even though they were equally available to the defense to call. In light of this defense argument -- to which the Government raised its sole objection during the summations -- the Government feels that it is at least entitled to the standard "missing witness" charge.

The charge was most recently given in a SDNY securities case by Judge Ward in United States v. Cohen, et al., 74 Cr. 447 as follows (Tr. 5333):

> "If it is particularly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness creates the presumption that his testimony would be unfavorable to such party. However, no such presumption should be drawn by the jury where the witness is equally available to all parties, or where the witness' testimony would be merely cumulative."

Indeed, given the fact that all these witnesses are more or less equally available to ~~both~~ all parties, this Court is requested to dispense with the first sentence of this standard charge and simply give the substance of the second, in line with the leading case in this Circuit dealing with the "missing witness" charge, United States v. D'Angiolillo, 340 F.2d 453, cert. denied, 380 U.S. 955 (1965), in which the Court stated (340 F.2d at 457):

> "The jury was instructed that Green was available to both parties and that they could not draw an inference against either party from the fact that he was not called as a witness. This instruction was proper."

Respectfully submitted,

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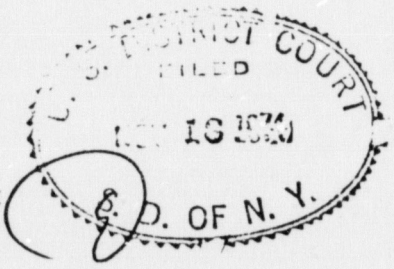
NATELLI'S REQUESTS TO CHARGE



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

- against -

74 Cr. 43 (HRT)

ANTHONY M. NATELLI and
JOSEPH SCANSAROLI,

Defendants.

----------x

NATELLI

DEFENDANTS' REQUESTS TO CHARGE

Defendants respectfully request the Court to include the following in its instructions to the jury.

REQUEST NO. 1

Essential Elements

In order to find each defendant guilty, you must find beyond a reasonable doubt the following essential elements:

1. That on or about September 27, 1969, the defendant made, or caused to be made, false or misleading statements in the September 27, 1969 proxy statement;

2. That this proxy statement was required to be filed with the S.E.C. and was, in fact, filed with the S.E.C.;

3. That the false or misleading statements concerned material facts; and

4. That the defendant knew that the facts set forth in ¶s 3 and 4 of the Indictment were material and that he knew that they were false or misleading, and that he caused them to be made with the intent to defraud.

REQUEST NO. 2

Essential Element No. 2

I instruct you that no statute or rule requires a proxy statement to be filed with the S.E.C. The statute only provides that it is a crime to solicit a proxy unless a proxy statement is on file. Hence, you must decide whether, under these circumstances, the proxy statement was required to be filed with the S.E.C.

REQUEST NO. 3

Materiality

You may not convict either defendant unless, in addition to the other essential elements, you find beyond a reasonable doubt that the facts which were allegedly misstated were material facts.

A material fact is a fact to which an average, reasonably prudent person would attach importance in determining a course of conduct to be taken or followed upon learning the fact, such as in deciding whether or not to buy or sell stock, or to lend or refuse to lend money, or to cancel a loan.

In deciding whether a fact is material, you are entitled to consider whether it was the kind of information that a financial statement ordinarily contains in order to fulfill its function of fairly presenting the financial position of the company. A balance sheet or an income statement is not supposed to contain all the information a creditor or potential investor might need or want in order to make informed judgments. The function of the financial statement is simply to present a basic summary of the company's position and operations. Any additional facts desired by

REQUEST NO. 3 (Cont'd.) -2-

Materiality

creditors or investors must be sought elsewhere.

Judge Mansfield's charge to the jury in United States v. Simon, transcript, pp. 3973, 3981.

I further instruct you that:

> The average prudent investor is not concerned with minor inaccuracies or with errors as to matters which are of no interest to him. The facts which tend to deter him from purchasing a security are facts which have an important bearing upon the nature or condition of the issuing corporation or its business.
>
> Escott v. Barchris Construction Corp., 283 F.Supp. 643, 681 (S.D.N.Y. 1968).

Further, the critical test is whether the financial statements in the proxy, as a whole, fairly presented the financial condition of NSMC. That is, in deciding whether NSMC's proxy statement was materially false or misleading in the respects alleged, the statement must be read and considered in its entirety and not fragmented. Therefore, you must decide whether the facts which were not disclosed were sufficiently important, in the context of the overall financial statement, to have deterred the average prudent investor from purchasing stock in the company.

REQUEST NO. 3 (Cont'd.) -3-

Materiality

Adapted from Escott v. Barchris Construction Corp., supra at 681; the charge in United States v. Simon, supra at pp. 3981-82 and 4020 of the transcript; United States v. Simon, 425 F.2d 796, 805 (2d Cir. 1969), cert. denied, 90 S.Ct. 1235 (1970).

REQUEST NO. 4

Defendant's Intent and Knowledge

In order to convict either defendant, you must find beyond a reasonable doubt not only that the facts set forth in Paragraphs 3 and 4 of the indictment were false or misleading and were material, but you must further find that the defendant knew that they were false or misleading and knew that they were material, and, nevertheless, caused them to be reported with the intent to defraud.

The indictment charges that the defendants "unlawfully, wilfully and knowingly" made materially false or misleading statements. Unlawfully simply means contrary to law. The other two terms mean much more. An act is done "knowingly" if it is done voluntarily and intentionally, and not because of mistake, accident, carelessness or other innocent reason. An act is done "wilfully" if it is done voluntarily and intentionally, and with the specific deliberate intent to violate the law. The word "knowingly" is added in order to insure that no one would be convicted who made (or caused to be made) a statement or representation which was false because of mistake, accident, carelessness or other innocent reason.

You must bear in mind that this is a criminal case, not a civil case. Therefore, you may not convict either defendant unless you find beyond a reasonable doubt that he consciously and deliberately misstated or falsely stated material facts with the intent of deceiving the persons reading the proxy. You may not convict either defendant even if you find that he acted negligently or carelessly with regard to the facts at issue, or that he exercised poor judgment. That is the standard of liability in a civil case. Poor judgment or negligence is not a crime. To convict either defendant of a crime in this case, you must be convinced beyond a reasonable doubt that he knew the facts were material and that he knew they were falsely stated and that he, nevertheless, reported them in a false and fraudulent manner with the evil intent to defraud.

Adapted from the charge in United States v. Simon, supra at pp. 3975, 4016, 4028-29, 4041-42 and 4045 of the transcript; United States v. Simon, 425 F.2d 796, 798 (2d Cir. 1969), cert. denied, 90 S.Ct. 1235 (1970); Feit v. Leasco Data Processing Equipment Corp., 332 F.Supp. 544, 568 (E.D.N.Y. 1971); Instructions in SEC Criminal Cases, §1.15, 41 F.R.D. 9311; Devitt

& Blackman, Federal Jury Practice and Instructions, §33.05 (2d Ed. 1970).

REQUEST NO. 5

Proving Intent and Knowledge

A person's intent or knowledge usually may not be proven directly because we are not able to peer into a person's mind and observe its operation. But, we are often able to infer what a person knew or intended from his conduct at or about the time in question. It is aptly said that sometimes "actions speak louder than words".

Now, in this case we have both direct and what we will call indirect or circumstantial proof of the intent and knowledge of each of the defendants back in 1969. The direct proof is the testimony of the defendants themselves. They were there, so to speak. Each of them knew what the state of his mind at the time was. Each of them has testified that he acted in good faith with an honest intent, that, if the undisclosed facts were material, he did not know it. In addition to this direct evidence of each defendant's state of mind in 1969, you have the evidence of his conduct before and after September 27, 1969, the date of the alleged crime. You should consider the conduct of each defendant during that period to see whether it helps you to determine his state of mind at the time. Did either defendant do anything suspicious at the time which would indicate that he had a guilty state

of mind? Or, did either defendant do anything which would indicate that he had an innocent state of mind? For example, you may consider as circumstantial evidence of an innocent state of mind the testimony that on the day the comfort letter was issued, the defendant Natelli suggested to NSMC's lawyer that the problem should be discussed with the S.E.C. You may further consider the testimony that after the comfort letter was issued, the defendant Natelli insisted in a conversation with Mr. Kurek that the information contained in the comfort letter must be disclosed to the Directors of the three companies which NSMC was in the process of acquiring despite the fact that a comfort letter was not required for any of those acquisitions.

Devitt & Blackman, Federal Jury Practice and Instructions, §13.06 (2d Ed. 1970)

See 2 Wigmore on Evidence, §293 (3d Ed. 1940).

REQUEST NO. 6

Generally Accepted Accounting Principles
and Defendant's Intent

The essential issue in this case is whether or not the defendants acted in good faith when they accounted for the questioned items, or to put it another way, did they act with criminal intent to defraud.

One of the circumstances that you are entitled to consider and weigh, in determining whether or not a defendant acted knowlingly and with intent to defraud, is whether he followed or deviated from generally accepted auditing standards and accounting principles in effect at the time; and we have heard testimony in this case about what some of those generally accepted auditing standards and accounting principles -- sometimes referred to as accounting practice -- were.

The fact that a defendant acted in accordance with generally accepted accounting principles does not necessarily mean he acted in good faith; nor does the fact that he failed to act in accordance with such principles necessarily mean that he acted in bad faith because adefendant may have failed to follow such guidelines out of carelessness, oversight or misjudgment; and, and I said before, you may not convict a

defendant of a crime because he acted negligently or used poor professional judgment. The question is: Did he act honestly and in good faith?

Further, the weight and credibility to be extended by you to the evidence concerning generally accepted accounting principles, and its persuasiveness, must depend, among other things, on how authoritative you find the precedents and the teachings relied upon by the parties to be, the extent to which they contemplate, deal with, and apply to the type of circumstances found by you to have existed here, and the weight you give to opinion evidence offered by the parties. Those may depend on the credibility extended by you to witnesses, the definiteness with which they testified, the reasons given for their opinions, and all the other factors affecting credibility, which I will discuss later.

Of course, a cardinal principle that you must bear in mind in weighing the evidence to determine whether a defendant acted in good faith or in bad faith is that his conduct must be judged not by hindsight, but by the facts as they existed at the time of the questioned conduct. That is to say that you must not hold either of these defendants to the same standards of knowledge, judgment and in depth familiarity with accounting principles which an expert witness might have

exhibited on the witness stand after the problem had become pervasively highlighted, and after the expert had spent many months reviewing the rules, re-examining the audit, and leisurely second-guessing the judgment of the auditor who had to make the judgment, which was just one of many on that audit, under the pressure of a real-life audit situation.

Adapted from the charge in United States v. Simon, supra at pp. 3978-81 and 4011 of the transcript. See also, United States v. Simon, supra, 425 F.2d 796, 805-806. Devitt & Blackman, Federal Jury Practice and Instructions, §40.13 (2d Ed. 1970).

REQUEST NO. 7

Motive

Proof of motive, while not an essential element of a crime, is admissible as evidence that a defendant committed the crime charged. Likewise, proof of lack of motive may be considered by you as evidence that a defendant did not commit a crime. The reason for this is that normally it is unlikely that a person will wilfully or deliberately violate a law unless he has some motive for doing so.

The traditional motive for making materially false representations in a financial statement is a monetary one: to make money for oneself by cheating others. In this regard, the defendants argue, and there seems to be no dispute, that they lacked any monetary motive to deliberately make false or misleading statements in NSMC's financial statement. You may consider for what it is worth the prosecution's argument that the defendant's motive for committing a crime was the desire to cover up a prior mistake.

Pointer v. United States, 151 U.S. 396 (1894); United States v. Simon, 425 F.2d 796, 808-809 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970); Adapted from the charge in United States v. Simon, supra at p. 3984-85 of the transcript.

NATELLI'S CONTENTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

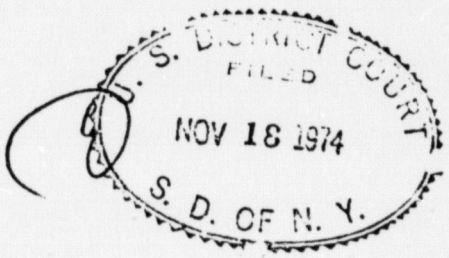
- against -

74 Cr. 43 (HRT)

ANTHONY M. NATELLI and
JOSEPH SCANSAROLI,

Defendants.

----------x



DEFENDANT NATELLI'S CONTENTIONS

1. Defendants contend that they never knowingly prepared or assisted in the preparation of false and fraudulent financial statements for NSMC. At the time NSMC first became a client of Peat, Marwick, Mitchell & Co., the company had already sold shares to the public and had shown a substantial amount of income in the report it had issued to the public for the nine month period ending May 31, 1968.

Defendants contend that they were advised by management that some of the company's income had been reported based on a system of recognizing income at the time a verbal commitment was obtained from the client to participate in a fixed-fee program.

2. Defendants contend that at the time they first became auditors of NSMC, it was a very young, rapidly growing company where record-keeping had not kept pace with its growth. Recognizing the needs of such a company and the problems involved where there existed an insufficiency of records, defendants contend that they attempted to cope with the situation in a professional way. In support of this contention, the defendants point to the fact that they attempted to verify the existence of recorded contracts in several ways. They first had Kurek prepare a list of such contracts. Mr. Scansaroli then discussed the contracts with the account executives who had obtained the commitment and reviewed files prepared by the account executives. In addition, as to the larger commitments, they made direct contact with either a representative of the client or with the advertising agency who was responsible for making the commitment.

3. Defendants contend that after Mr. Scansaroli went to New York and satisfied himself as to the authenticity of these contracts, a decision was made by Mr. Natelli that the percentage of completion method was an appropriate method to fairly reflect the company's financial position.

4. Defendants contend that they acted in total good faith with regard to the 1968 audit, and in this regard they point to the fact that there is no evidence or even a contention by the Government that they had any motive to do anything other than an honest job on the 1968 audit.

Although the defendants have testified that the records at August 31, 1968 were not as complete as they would have preferred, they point to the fact that this problem was not discussed with them until after August 31, 1968, and thus PMM could not go back and change the record system. As evidence of defendants' good faith, defendants point to the fact that at the December meeting, Mr. Natelli insisted on better records for the future, including written commitments for all future contracts and advised NSMC's officers that in future audits he would insist that unbilled receivables be confirmed in writing. As part of his suggested program, Mr. Natelli proposed the adoption by the Company of time sheets and status reports to be completed by the account executives, as a basis for determining the percentage of work performed in the future.

5. As to the write-offs of the 1968 contracts, defendants contend that the Company itself wrote off certain of these contracts. As to the rest of the written-off contracts, defendants contend that these involved a unique situation of employee fraud and misconduct. They contend that the fact that Mr. Michaels had been fired and that it had been determined that the commitments that he reported had never existed led Mr. Natelli to conclude that these contracts should be written off as of August 31, 1968. Defendant Natelli contends that this was an honest judgment made in good faith.

6. Defendants contend that there was no intent to deceive or mislead in the preparation of the proxy statement, and particularly with respect to the entry which combined the write-offs of the Ron Michaels' contracts with the write-off of the provision for deferred taxes. In this regard the defendants point to the testimony of Carol Raimondo and their own testimony that they honestly believed that the provision for deferred taxes, which was originally reported in the August 31, 1968 financial statements, was overstated by approximately $190,000. Defendants also point to the fact that after discussion with Mr. Natelli, Mr. Scansaroli made a third entry to write-off the Listerine contract which also was attributable to Ron

Michaels. Defendants further contend that this entry could not be part of a scheme to cover-up because Mr. Natelli originally drafted a note designed to disclose both the write-off of the Michaels' contract and the adjustment of the tax provision.

7. With regard to the Government s allegation that the elimination of the note from the draft of the proxy was part of a plan to cover-up, defendants point to Mr. Otkiss' testimony that Mr. Natelli discussed the question of the disclosure of these items with him before making the final decision. As Mr. Otkiss testified, because the effect on net income of the sales write-off and the tax adjustment was only $21,000, it was agreed that a footnote disclosure was not necessary. In this regard the defendants also point to the testimony of Mr. Kurek that he told the S.E.C. in January, 1970, that disclosure of these items had not been made because the net effect of the adjustments was only $21,000.

8. With regard to the booking of the Eastern contract, defendants contend that Mr. Natelli's decision to book the contract was made in good faith. Although the commitment letter was not provided until August 15th, Mr. Natelli did not know it was not genuine. In fact, defendants contend that

the Government has failed to prove that the Eastern commitment was not a genuine, legally binding commitment. In addition, defendants contend that Mr. Natelli did not simply rely on the letter in making the decision to book the Eastern agreement. Instead, he waited to make his decision until he had reviewed copies of the presentation to the client with Dennis Kelly and had discussed the program with him. Moreover, Mr. Natelli also obtained and reviewed the time reports of the account executive for the program, Mr. Bushnell, to determine that Mr. Bushnell had actually performed services for the client. In fact, it was not until all of these steps had been taken that Mr. Natelli concluded in good faith that the Eastern contract could be booked. In this regard, the defendants contend that since they were not auditing the May 31, 1969 financial statements, Mr. Natelli did more than was necessary to satisfy himself that the company had the right to book the Eastern contract.

9. As to the items questioned by Douglas Oberlander, defendants contend that the decision to leave certain of these items on the books was made in good faith after a discussion between Mr. Kurek and Mr. Scansaroli, in which Mr. Kurek stated the Company's position that the commitments should not

be written off. As proof of their good faith, defendants point to the fact that the May 31, 1969 financial statements were unaudited and to Mr. Kurek's testimony that at the time of the discussion, Mr. Kurek did not believe they were doing anything improper.

As further evidence of defendants good faith, defendants point to the fact that the largest single commitment questioned by Mr. Oberlander -- the Syntex commitment -- was in fact written-off at the time the proxy was prepared.

10. Defendants further contend that the Government has failed to offer any proof that at the time the proxy was prepared, defendants knew that the proxy contained false and misleading statements or that the defendants acted knowingly and with criminal intent. On the contrary, defendants contend that the evidence shows that their own actions indicate that they did not believe they did anything wrong in August and September, 1969. As proof of this, Mr. Natelli points to the testimony of Mr. Kurek that in October 31, 1969, the day of the Interstate closing, Mr. Natelli told Mr. Eplee, an attorney at White & Case, that the Company should take the matter up

with the Securities and Exchange Commission. As further evidence of his good faith, Mr. Natelli points to Mr. Kurek's testimony that Mr. Natelli insisted, after the Interstate closing had taken place, that the three companies to be acquired subsequently also be informed of the contents of the comfort letter, despite the fact that their acquisition agreements did not call for such a comfort letter. In addition, Mr. Natelli points to the testimony of both Mr. Johnston and Mr. Colona that when they began the August 31, 1969 audit, Mr. Natelli told them of the problems that had developed with regard to the August 31, 1968 unbilled receivables and directed them to conduct a thorough examination of the unbilled receivables on the Company's books at August 31, 1969.

11. In sum, the defendants contend that throughout 1968 and 1969 they acted in complete good faith and never attempted to cover-up anything.

Respectfully submitted,

MARTIN, OBERMAIER & MORVILLO
Attorneys for Defendant
Anthony M. Natelli

NATELLI'S SUPPLEMENTAL REQUESTS TO CHARGE

U.S. DISTRICT COURT
FILED
JAN 14 1975
S.D. OF N.Y.

REQUEST NO. 8

Responsibility of Auditors

Now, outside, independent auditors such as Natelli and Scansaroli have no responsibility for the operations or management of a company. Therefore, as to NSMC's audited, consolidated statement of earnings as of August 31, 1968, the defendants' responsibility in accordance with their engagement was, first to render an opinion that satisfied them that the statement fairly presented the results of the operations of the client; and, second, to be satisfied that the statement contains no misstatement of material facts known to them. As to the unaudited statement of earnings for the nine months ended May 31, 1969, the defendants had no responsibility to render an opinion that the statement fairly presented the results of the client's operations. The defendants' only responsibility as to this statement was to be satisfied that, as far as they knew, the statement contained no misstatement of material facts.

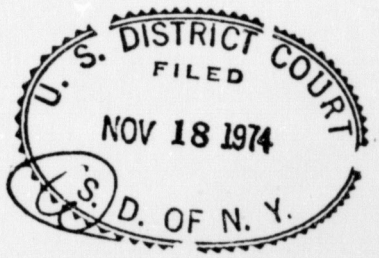
In addition, you must bear in mind that as to Paragraph 3 of the indictment, there is no allegation that the actual figures in the audited consolidated statement of earnings presented in the proxy were false of fraudulent.

The only allegation is that the footnote was misleading because it did not disclose that the figures presented in the proxy were to be reduced by the write-offs of certain sales that had been reported in the August 31, 1968 statement of earnings that was contained in the company's 1968 annual report to stockholders. You must decide whether that information was material, i.e., important to the average, prudent investor, whether the defendant knew it was material, and whether he deliberately, and in bad faith, failed to disclose it.

See the charge in United States v. Simon, supra at p. 3982 of the transcript.

SCANSAROLI'S REQUESTS TO CHARGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,

-against-

ANTHONY M. NATELLI and
JOSEPH SCANSAROLI,

Defendants.

74 Cr. 43 (HRT, Jr.)

DEFENDANT SCANSAROLI'S
REQUESTS TO CHARGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	74 Cr. 43 (HRT, Jr.)
ANTHONY M. NATELLI and JOSEPH SCANSAROLI,	:	
Defendants.	:	

DEFENDANT SCANSAROLI'S
REQUESTS TO CHARGE

The defendant Scansaroli respectfully requests the Court to include the following in its Charge to the jury:

REQUEST NO. 1

INDICTMENT MERELY AN ACCUSATION

An indictment is but a formal method of accusing a defendant of a crime and bringing the case into Court for trial and determination. The indictment is not any evidence or even indication that a crime has been committed and no inference of any kind may be drawn from the indictment. The indictment is not to be considered by you except as defining the charge against the defendants as to which the evidence at the trial must be addressed. The fact that the defendants are the subject of this indictment and are on trial here should not be taken against them in any way whatever.

REQUEST NO. 2

PRESUMPTION OF INNOCENCE

The defendants are presumed to be innocent, and this presumption has the weight and effect of evidence on their behalf. This presumption of innocence continues in the defendants' favor throughout the trial and even during your deliberations in the jury room and it is overcome only if the time ever comes when in your view guilt is established beyond a reasonable doubt.

REQUEST NO. 3

GOVERNMENT AS PARTY

The fact that the Government is a party here -- that the prosecution is brought in the name of the United States of America -- entitles it to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, Government and individuals alike, stand equal before the bar of justice.

REQUEST NO. 4

GUILT IS PERSONAL

It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against the other defendant. Each defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct, and any other evidence in the case which may be applicable to him.

Now you will bear in mind, ladies and gentlemen, that there are two defendants here, they are charged as separate individuals, and the guilt or innocence of each must be passed upon by you separately. Guilt or innocence is a personal thing. Each defendant has the right to the same consideration on your part as if he were being tried alone.

REQUEST NO. 5

GOVERNMENT'S BURDEN OF PROOF

The burden is on the Government to establish a defendant's guilt beyond a reasonable doubt and that burden applies to every essential element of the charge. If any element necessary to establish the alleged offense charged in the indictment is not proved to your satisfaction beyond a reasonable doubt, then you must acquit the defendant regardless of what other facts you may find have been proven.

REQUEST NO. 6

REASONABLE DOUBT

A reasonable doubt is a fair doubt, based upon reason and common sense, and arising from the state of the evidence. A reasonable doubt is a doubt which causes a person to hesitate in the more serious and important affairs in his life. It is a doubt which a person has after weighing all the evidence. A reasonable doubt is one which appeals to your reason, your judgment, your common sense and experience.

A reasonable doubt exists in any case when, after careful consideration of all the evidence, the jurors do not have an abiding conviction which amounts to a moral certainty that a defendant is guilty as charged.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. And if two conclusions can reasonably be drawn from the evidence,

REQUEST NO. 6 Con'td.

one of innocence and one of guilt, the jurors must adopt the one of innocence. A defendant is never to be convicted on mere suspicion or conjecture.

Therefore, a defendant must be acquitted unless the overall evidence is incompatible with innocence and satisfies the jurors beyond a reasonable doubt, as a reasonable doubt has been defined, that a defendant is guilty.

REQUEST NO. 7

NO CONVICTION ON SUSPICION

You must also remember that no conviction can be based on suspicion or conjecture or speculation, no matter how strong. A conviction can only be based on actual proof of guilt beyond a reasonable doubt, and if the proof does not meet that standard, you must acquit.

REQUEST NO. 8

DIRECT EVIDENCE

Direct evidence is where a witness testifies to facts of his own knowledge; for example, things that he saw, that he was present at, things that he watched; anything that a witness testifies about which comes to him by virtue of his own senses, his own observations, is direct evidence.

REQUEST NO. 9

CIRCUMSTANTIAL EVIDENCE

In this case the Government has also offered circumstantial evidence on the basis of which it asks you to draw certain inferences. Circumstantial evidence is, as I think most of you know, evidence that tends to prove a disputed fact by proof of other facts which have a logical tendency to lead one's mind to conclude that the fact in issue exists.

Circumstantial evidence may be considered by you and should not be given any less weight because it is circumstantial rather than direct.

Circumstantial evidence need not exclude every possible innocent explanation. However, if the reasonable inferences to be drawn from such evidence lead to two conclusions, one favoring guilt and the other favoring innocence -- that is, if you find that the evidence respecting the defendant is as consistent with innocence as it is with guilt -- then it is your duty to accept the inference which favors innocence. The reason for this is obvious; since each inference is reasonable, there would be a reasonable doubt as a matter of law with respect to that evidence.

REQUEST NO. 10

CIRCUMSTANTIAL EVIDENCE - INFERENCES
(To follow general charge of circumstantial evidence)

You are instructed as a matter of law that to draw an inference adverse to the defendants, or any of them, such inference must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence.

United States v. Casey, 428 F. 2d 229, 231 (5th Cir. 1970); Montoya v. United States, 402 F. 2d 847 (5th Cir. 1968). Cf. United States v. Adal, 368 F. 2d 962, 964 (2d Cir. 1966), cert. denied, 386 U.S. 970 (1967); United States v. Woodner, 317 F. 2d 649, 651 (2d Cir.); cert. denied, 375 U.S. 903 (1963).

REQUEST NO. 11

INFERENCES

Different inferences can be drawn from the evidence whether that evidence is direct or circumstantial. The Government asks you to draw one set of inferences while the defendants ask you to draw another. It is for you alone to decide what inferences you will draw from the evidence and what facts you find to have been proven. But in this connection you must remember that if two sets of inferences may reasonably be drawn from the evidence, one consistent with innocence and the other consistent with guilt, then you must not convict, because as I have explained, the Government must prove each and every element beyond a reasonable doubt. Obviously, when faced with these two competing reasonable inferences, one pointing to guilt and one pointing to innocence, the Government has failed to prove that fact beyond a reasonable doubt and therefore, you must acquit.

Adapted from the Charge of the Hon. Dudley B. Bonsal, in United States v. Re, Tr. p. 5743.

REQUEST NO. 12

ELEMENTS OF THE OFFENSE CHARGED

The Government contends that the defendants made or caused to be made false and misleading statements with respect to material facts in a proxy statement filed by NSM with the Securities and Exchange Commission.

The elements of the offense of filing an allegedly false report are as follows: (1) you must find that the report -- here a proxy statement -- was required to be filed; (2) you must find that a fact relating thereto was stated falsely or in a misleading manner, or concealed; (3) you must find that the fact was a material fact in the sense that the true statement, or disclosure of it, would influence a reasonable man; and (4) you must find that the particular defendant as to whom you are deliberating knew that a report was required to be filed, that the fact was material as I have defined it, and that the particular defendant wilfully and knowingly stated it falsely or in a misleading manner or concealed it.

Thus, to find that the offense charged was, in fact, committed, you must find beyond a reasonable doubt that the particular defendant acted intentionally to misstate or conceal a material fact in a report, which was required to be

REQUEST NO. 12 Con'td.

filed, with a bad purpose to do that which the law forbids. If, on the other hand, you conclude that the defendants acted in good faith, it is your duty to acquit.

REQUEST NO. 13

KNOWINGLY AND WILFULLY

An act is done knowingly if it is done voluntarily and purposefully and not because of mistake, inadvertence or other innocent reason.

An act is wilful if it is done knowingly, deliberately and with an evil motive or purpose. An act is not done wilfully if it is done as a result of a mistake, carelessness, lack of an evil motive or purpose or for some other innocent reason.

Additionally, the Government must prove beyond a reasonable doubt that a particular defendant had the specific intent to accomplish the crime charged.

In this connection you should bear in mind the defense contention that the conduct of the defendants was not wilful and knowing, as I have just defined those terms, in that they acted in good faith. Thus, the defendants urge, that even if you were to find as a matter of fact that there was a failure to disclose certain information in the Proxy Statement, such conduct was not "wilful" or "knowing" to the extent that they did not have "an evil motive" and their reasons for doing so were entirely innocent.

Adapted from the Charge of the Hon. Dudley B. Bonsal in United States v. Re, Tr. pp. 5729-30.

REQUEST NO. 14

INTENT AND MOTIVE

As knowing participation in a scheme to prepare false financial statements is the essence of the offense charged, and the defendants' alleged part in the alleged scheme was to assist in the preparation of false financial statements that they knew were false with the intent to deceive, you must understand that the essential nature of the charge is deliberate and intentional wrongdoing, not some unintentional wrong, such as mistake or negligence. For mistake or negligence the defendants might be civilly liable, however honest their actions and judgments, but by the same token the defendants cannot be held criminally liable, however mistaken their conclusions or erroneous their judgments, unless their expressed view on the financial statements was a knowing and intentional misrepresentation or concealment of fact. In short, mistake or negligence, however gross or inexcusable it might be, is not a crime and cannot be a basis for conviction of the crime charged.

Intention is the key distinguishing factor between civil and criminal liability. One may be civilly liable, as for negligence, with the best intentions in the world. On the

REQUEST NO. 14 Con'td.

other hand, generally speaking and certainly in this case, there can be no criminal liability unless a deceitful intention and fraudulent purpose actuated and accompanied the defendants' actions. Good faith is a complete and absolute defense to the crime charged here.

On the question of whether defendants had any wrongful intent, the presence or absence of motive to falsify and deceive is necessarily a prime consideration. People do not ordinarily commit crimes without a motive to do so. Therefore, you must consider whether the defendants had any motive to do that with which they are charged. It is clear that there was no financial motive, the usual motive in any fraud scheme. That fact must be duly weighed by you in determining the defendants' intention.

REQUEST NO. 15

GENERALLY ACCEPTED ACCOUNTING PRINCIPLES

It appears that generally accepted accounting principles are to some extent stated in a professional code and are otherwise derived from the literature and precedents of the profession. It also appears that to a large extent the handling or treatment of problems or questions that arise in an audit are matters of judgment, and matters on which individual and equally honest judgments might differ. To the extent that defendants were called upon or permitted to apply judgments, they must be acquitted if judgment was exercised, no matter how erroneous that judgment in retrospect may appear to be. They may be found guilty only if they abandoned judgment and rendered an opinion which did not represent their judgment, but was a knowing misrepresentation of their opinion with the intent to deceive.

If, on the other hand, you should find that some disclosure was required by generally accepted accounting principles, you will then have to determine whether the failure of a defendant to make such disclosure was due to inadvertence, mistake, negligence or willful disregard of professional standards with an intent to deceive. If disclosure was a matter of judgment under the circumstances,

REQUEST NO. 15 Con'td.

rather than a clear requirement according to generally accepted accounting principles, you may not find a defendant culpable if he exercised his judgment, no matter how mistaken it may have been. Unless you find beyond a reasonable doubt that any failure to disclose was a deliberate disregard of known standards with the intent to deceive, you must hold the defendants guiltless in respect to these allegations of the indictment.

REQUEST NO. 16

THE PHRASING OF THE FOOTNOTE

The issue here is sharply presented of whether the phrasing of the footnote was the result of a good faith judgment or a deliberate falsification with intent to deceive. Only if you find beyond a reasonable doubt that a defendant consciously framed the footnote with the intention to deceive may you find him criminally culpable.

REQUEST NO. 17

AIDING AND ABETTING

(The following should be read after a recitation of the statute).

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"

United States v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962), quoting Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) and United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

REQUEST NO. 18

TESTIMONY OF A PARTICIPANT

You heard testimony in this case from Bernard Kurek, who from his testimony was shown to be a participant in some of the events and transactions relevant to this trial. Testimony by a participant presents problems that warrant some special thought. Often the Government brings into Court the testimony of participants in the events in question because these people often have evidence that is relevant. There is no prohibition against the use of such testimony.

But, testimony of a participant "implicating a defendant as a perpetrator of a crime is inherently suspect, for such a witness may well have an important personal stake in the outcome of the trial [a participant] so testifying may believe that [a particular] defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for . . . his testimony."

You are instructed to scrutinize the testimony of a participant with particular care and to view it with extreme caution in determining whether you should find it to have been credible.

Was the testimony of the participant a fabrication in whole or in part induced by some promise or some belief that he would benefit from giving false testimony?

REQUEST NO. 18 Con'td.

Or on the other hand, did this particular witness as a matter of conscience or convenience or for any other reason take the witness stand and tell you the truth in whole or in part?

In the end, with participants as with all other witnesses, you must weigh the person, his demeanor, what he said, and how he said it, and all the surrounding circumstances in making your delicate judgment about credibility. But bear in mind what I said about scrutinizing participant testimony with particular care and caution.

Adapted from the Charge of the Hon. Marvin E. Frankel in United States v. Sweig, Tr. pp. 2397-99. Quotation from United States v. Padgent, ---- F. 2d ---- (2d Cir. October 15, 1970).

REQUEST NO. 19

NO FRAUD ON SHAREHOLDERS, CREDITORS OR OTHERS

During the course of the trial and especially in the Government's opening, you may recall references to charges here that others were defrauded as a result of the allegedly false financial statements contained in the Proxy Statement.

I instruct you as a matter of law that there are no charges here that the defendants in any way defrauded the shareholders, creditors or anybody else and you should not in any way let these references play any part in your deliberations on the guilt or innocence of each of the individual defendants.

REQUEST NO. 20

SEC RULES

I instruct you as a matter of law that no rule or regulation of the SEC requires disclosure of any of the matters which the Government claims should have been disclosed in the financial statements in the proxy statement.

REQUEST NO. 21

GUILT BY ASSOCIATION

It must be remembered, ladies and gentlemen, that mere association with others, standing by itself, is an insufficient basis for finding that a defendant committed a crime.

You may not find a defendant guilty merely because he associated with others who happened to be committing the crime charged.

As I previously told you, the doctrine of guilt by association has no sanction in the law.

REQUEST NO. 22

ASSOCIATION NOT PROOF OF CHARGES

The fact that the defendants on trial acted together and agreed on auditing steps and procedures in the preparation of the financial statements is no evidence of the charges in this case. Such cooperation would be expected, and was indeed required, in the discharge of defendants' duties as auditors.

Similarly, no adverse inference may be drawn from the fact that the defendants had some association with Kurek and others in the preparation of the financial statements. It is natural, normal and necessary that the auditors have association with management in the preparation of financial statements. Your duty is to determine whether that association was criminal. Such association by itself cannot be proof of the charges in this case.

REQUEST NO. 23

CHARACTER EVIDENCE

You have heard evidence of the defendants' good character and of their reputations for honesty and integrity. This character evidence must be considered by you in your deliberations along with all of the other evidence in the case and may, of itself, create a reasonable doubt as to the guilt of the defendants. You may properly consider whether persons of such character and reputation would be likely to commit the crime charged in the indictment.

REQUEST NO. 24

CHARTS

Several charts were admitted in evidence. These charts in and of themselves do not constitute independent proof; they are only visual aids and not to be considered by you as independent evidence, which can only be the oral testimony and the documents admitted into evidence. You must decide whether the charts correctly and fairly present the data set forth in the testimony and documents. You must also decide whether the charts summarize all of the pertinent evidence relating to the subjects which they purport to summarize or if, on the other hand, they are incomplete and deal with only a portion of that evidence. You must not consider the charts as substitutes for the original testimony and documents.

The same rules apply to the charts used by counsel on summation which were not offered into evidence. These charts were exhibited to you as visual aids to assist you in understanding the contentions of the party using them. You must not consider them as substitutes for evidence, but you certainly are permitted to rely upon them as an aid in determining the validity of the various contentions of the parties.

Adapted from the Charge of the Hon. Dudley B. Bonsal, in United States v. Re, Tr. pp. 5743-44.

REQUEST NO. 25

JURY'S RESPONSIBILITY

Remember that there is only one triumph in any case and that is the triumph of the truth as you find it.

Remember also that the question before you can never be: Will the Government win or lose the case? The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

Respectfully submitted,

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Attorneys for Defendant Joseph Scansaroli
110 East 59th Street
New York, New York 10022
(212) 593-0100

Dated: New York, New York
November 7, 1974

SCANSAROLI'S SUPPLEMENTAL REQUESTS TO CHARGE

SUPPLEMENTAL REQUEST NO. 1

SCANSAROLI'S FACTUAL CONTENTIONS

Joseph Scansaroli contends that the government has totally failed to meet its burden of proof of establishing his guilt beyond a reasonable doubt. He contends that all of his work in connection with National Student Marketing Corporation was performed by him to the best of his professional ability and in absolute good faith. He argues that the footnote to the 1968 financials appearing in the proxy statement made sufficient disclosure and that no material misstatement was made as to the company's sales for the unaudited period ending May 31, 1969. He denies that he ever intended to permit the company to issue false financial statements and contends further that he had no motivation to do so.

He points to the testimony of Mr. Natelli to the effect that each and every material decision at issue in this lawsuit was made by Natelli, and that the decision with respect to the footnote disclosure was discussed with and approved by Lee Otkiss, the SEC reviewing partner.

Scansaroli contends that his work on the 1968 audit represented the exercise of his best judgment at the time, given the situation confronting him - the company had previously utilized the contracts in progress method of accounting in the prior quarters of 1968 and that the company's rapid

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growth had outpaced the ability of NSMC's accounting department to keep detailed records.

He points to the further fact that all of work he did or indeed, may not have done, is reflected in the workpapers which were prepared by him at the time, and bound up to be maintained for an indefinite time. In this regard he calls attention to the testimony of Arnold Berman who received the Special Sales binder upon a simple request to do so, and the circumstantial evidence which indicated that it was Mr. Scansaroli who made the binder available to Berman and discussed the matter openly and freely with Berman.

Mr. Scansaroli contends that the review of the contracts in progress in connection with the proxy statement is further evidence of the absence of any criminal intent on his part. You will recall that he reviewed these contracts in connection with the proxy statement in May 1969 (based on the Feb. 28, 1969 figures) and recorded his findings in his work papers. In August, 1969 it was Mr. Scansaroli who assigned Douglas Oberlander to do the review based on the May, 1969 figures. Mr. Scansaroli argues that if he had any concern about his past conduct he would not have assigned Oberlander, let alone anyone else, to do this work but rather would have

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done it himself and thus avoid any exposure. He also points to the testimony of Kurek regarding their discussion of Oberlander's findings. As a result the largest commitment questioned by Oberlander, namely Syntex, was written off. In this regard Scansaroli further relies upon the testimony of Kurek to the effect that there was nothing sinister in their conversation about Oberlander's work papers and finally directs your attention to the representation letter signed by Kurek attesting to the accuracy of the May 1969 figures, and Kurek's subsequent refusal to acknowledge that the write-offs raised by the comfort letter should have been known at the time of the May figures.

Scansaroli also relies on the undisputed testimony of John Johnston and Douglas Oberlander that he never asked them to do anything improper or to conceal anything pertaining to the contracts in progress, and that he even suggested a further audit step for Johnston to pursue when Johnston was performing the examination of this account in connection with the August 31, 1969 audit of NSMC's books.

Scansaroli emphatically denies that he had any motive whatsoever which would have caused him to commit a

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crime. He testified that a mistake in an audit would not cause a loss of license, and although he does not recall saying anything to Mr. Natelli regarding loss of license, he does not dispute Mr. Natelli's testimony that Scansaroli jokingly referred to loss of license. Indeed you will recall that Kurek's reference to a similar conversation was also to the effect that Scansaroli's remark was made in a light hearted way, and related solely to whether the right accounting decisions had been made in 1968.

Mr. Scansaroli contends that if there was any concern about the work done on the 1968 audit it would have been an irrational and foolhardy act to make a retroactive adjustment to those 1968 figures; rather, the Michaels' contracts could have been written off against 1969 figures, and the Pontiac commitment left on the books, thus avoiding any unfavorable impact in 1969, and not bring 1968 into issue at all.

In sum, Scansaroli denies any concealment or wrongdoing - he contends he is innocent.

TRANSCRIPT DECEMBER 20, 1974

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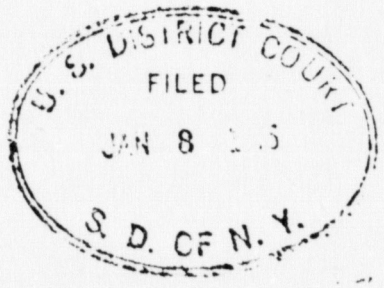
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA, :

Plaintiff, :

-against- : 74 Cr. 43

ANTHONY M. NATELLI and :
JOSEPH SCANSAROLI,

:

Defendants.

:

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BEFORE:

HON. HAROLD R. TYLER,

District Judge

New York, New York
December 20, 1974 - 3:45 p.m.

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney for the
Southern District of New York
BY: FRANKLIN B. VELIE, ESQ.,
JED RAKOFF, ESQ., Assistant United States Attorneys

MARTIN, OBERMAIER & MORVILLO, ESQS.,
Attorneys for Defendant Natelli,
BY: JOHN MARTIN, ESQ.,
Of Counsel.

MORRISON, PAUL, STILLMAN & BEILEY, ESQS.,
Attorneys for Defendant Scansaroli
BY: CHARLES STILLMAN, ESQ.,
Of Counsel.

THE CLERK: United States versus Natelli and Scansaroli.

MR. VELIE: The Government is ready.

THE COURT: You get yourself seated and I will be right with you. Somewhere the papers have been misplaced.

(Pause.)

THE COURT: Mr. Stillman, my suggestion of 3:00 o'clock turned out not to be very helpful either. I apologize.

MR. STILLMAN: That's all right, your Honor.

THE COURT: There were a lot of matters added on at the last moment this morning.

Who wishes to proceed first? Mr. John Martin, Mr. Stillman, how do you want to do it?

MR. MARTIN: I will start, your Honor.

Your Honor, we are moving obviously pursuant to Rules 29 and 33. I would like to try to be brief.

I will start with what I think is in my view the most glaring omission in the Government's proof, which I think has to do with the Eastern contract, which is paragraph 4 of Count 2, supplemented by the Government's bill of particulars, and as obviously your Honor is aware, a good deal of the proof at the trial, the argument made by the Government, their contention

that this was a false and fraudulent contract.

I think, as your Honor had indicated at the trial, there was certainly, given the circumstances at the printer, ground for the Government to argue to the jury that this was a suspicious circumstance, something that should have led my client to view this with some degree of caution. But I do think what is lacking here is actual proof by the Government that the contract was indeed false.

THE COURT: But I, under your entreaties, excluded the Government from proving that later.

MR. MARTIN: I think what your Honor excluded the Government from doing was proving that fact by evidence that did not rationally tend to prove it. Your Honor's suggestion was -- and I think quite correct from the objection that was made -- was that the proof they were offering was not probative of that issue. They were trying to prove that because the contract did not come through, where the indication was that the NSM Campus Rep system had fallen apart, that was the proof they were trying to offer, that the money didn't come in, but the circumstances showed that was because the Campus Rep system fell apart.

I suggest, your Honor, there was a very clear way for the Government to prove that it was false, but

they chose not to because of what that would show as to the attempt to deceive these defendants by Randall and others.

There was an indictment, which has probably been assigned to your Honor, filed about a week ago of Mr. Mullen of Eastern Airlines.

THE COURT: Right.

MR. MARTIN: I think the way to prove that that was false was to offer evidence of Kelly, of Randall, or whatever other evidence the Government had to present to the grand jury on that, that a false document was obtained --

THE COURT: Let me just simply say this. I have seen your point, and you have long seen it, and I would go so far as to say that perhaps the Government might have done something like that. But my feeling is that the record was sufficient for the Government to argue what I consider the core issue in this case. Was the defendant Natelli behaving in such a way as to be palpably guilty of blinding himself to facts which he should have inquired about, or put differently, was he so recklessly indifferent to what was going on as to be culpable, and the only basis on which the Eastern testimony at all came in down at Pandick and so on was I think on those issues or that issue

which has been stated in two different ways.

MR. MARTIN: Your Honor, that proof simply goes to the second element of the crime, which is knowledge or a basis to infer knowledge of falsity. But I think first they have to prove actual falsity. That is what I am directing myself to, your Honor. They never proved this was false.

THE COURT: I don't regard the Pandick Press business as being really the core of the Government's case. I regard the core of the Government's case as being the work papers and the financials on which your client worked.

Sure, I think the Government was entitled to get into what happened at Pandick bearing on the knowledge and intent, if any, of Mr. Natelli. But you make it sound as if the crux of the case was the Eastern contract.

Granted there was a lot of talk at trial about the Eastern contract, but I don't think it makes it the core of the case.

MR. MARTIN: I won't belabor the point. Just let me try to be clear in the point I am trying to make, your Honor.

The Government charged that the proxy was false because of the inclusion of the Eastern contract. That was specified in their bill of particulars.

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THE COURT: That is one of their statements, yes.

MR. MARTIN: It seems to me to prove that particular charge as to my client they must show two things. One, that the Eastern contract was in fact false, and two, my client knew it.

I am submitting that they did not --

THE COURT: Or that your client was recklessly indifferent as to whether it was a valid deal or not.

MR. MARTIN: Even taking that, your Honor, it seems to me they still had to prove -- whether knowledge or reckless disregard -- they still had to prove the primary thing as to falsity, and that is where I am saying their proof was insufficient.

THE COURT: All right. I understand.

MR. MARTIN: Also, your Honor, with regard to paragraph 3 of Count 2, I think there was insufficient evidence to show that the disclosure in the footnote was in fact material. The evidence all showed that the financial statements were accurate.

THE COURT: Again, I see your factual arguments, but the jury decided that.

I understand your point. You argued that eloquently early and often, as was proper enough, to the jury. But the jury felt differently, and I think there

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was evidence from which they could feel differently.

MR. MARTIN: I also, just to conclude, your Honor, feel that there was insufficient evidence to show that at the time Mr. Natelli knew this particular footnote disclosure to be a material item, and I think particularly in light of the fact of the testimony of Mr. Buck, who was the controller of NSM at the time, that he apparently never considered this to be necessary to the fair presentation of the financial statements, and he himself was a CPA, that there was insufficient proof that this was something that the people at the time realized, not what somebody going back and looking with hindsight many years later after the collapse of NSM saw, but something the people saw at the time, and I think that that evidence is lacking in the record.

THE COURT: All right. Mr. Charles Stillman.

Again, I should say to you I, of course, read your briefs. Incidentally, I would thank both of you for what you did here. I think you made it very concise and plain and you were most timely.

I hope that Mr. Franklin Velie would share my gratitude, because more frequently than not we don't get this kind of concise statement or brief on motions of this kind.

MR. VELIE: I do, your Honor. Thank you.

THE COURT: One thing I think we ought to strip aside because I don't think I disagree with you. The Government somehow argues something about Scansaroli being involved in the evening in Pandick. At least I read it that way, and you apparently did too.

MR. STILLMAN: Absolutely. That is what he says.

THE COURT: I don't understand that Scansaroli was there at all doing these things about the Eastern deal and all that. He was there, but he wasn't doing this kind of thing.

MR. STILLMAN: Absolutely.

THE COURT: And no one said to the contrary.

MR. STILLMAN: Precisely.

THE COURT: But I never understood that the case turned and fell on what happened so far as Scansaroli was concerned that evening at all. Maybe Mr. Velie thinks differently, but I certainly never understood it, and I can't imagine the jury did.

I think what Scansaroli was involved in, and what I believe the jury was considering about him, was the methods he used in checking out some of these accounts and some of the matters which showed up so poorly for him in the work sheets, but certainly nothing to do with what

went on the night at Pandick, except perhaps just to show that he was still there and one of the boys. But that to me really is of no great consequence.

MR. STILLMAN: I of course totally agree with your Honor.

THE COURT: Maybe we ought to ask Mr. Velie. I never understood you to even argue that there was anything significant about Scansaroli's involvement on the night in question.

MR. VELIE: I readily concede it is not a crucial point, although I do make a factual argument which differs. But I will concede that it is not crucial to the Government's case.

THE COURT: No, not against Scansaroli.

MR. VELIE: No.

THE COURT: In any event, Mr. Stillman, what do you want to say in addition to what we have here in the briefs?

MR. STILLMAN: What I would like to say, your Honor, is this:

I think it has been our combined experience that motions of this kind are generally made moments after unfavorable verdicts or at the time of sentencing, in the agonizing moments before sentence is imposed, and

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as your Honor knows, I pressed very hard to have the opportunity to be heard today, in between those two events, with the hope that I could persuade your Honor, as I most strongly feel, that insofar as Joseph Scansaroli is concerned there is simply not enough evidence from which a jury could fairly conclude beyond a reasonable doubt that he was guilty of the one crime of which he was charged in this indictment.

I would like to call to your Honor's attention what I believe is an obvious fact, that the evidence with respect to Joseph Scansaroli is different than the evidence with respect to Mr. Natelli, but I would urge your Honor not to read into that anything that I am saying to indicate that Tony Natelli did anything.

I must at this point just talk about Joseph Scansaroli. I know, your Honor, these things kind of wind up in the Court of Appeals, but I respectfully submit that in this case if there had been some evidence that Scansaroli had been corrupted then I would say let the Court of Appeals decide, and I would say if there was some evidence that Scansaroli was in some kind of a conspiratorial arrangement with Randall or Kurek, then I would say let the Court of Appeals decide it.

But I respectfully submit, Judge Tyler, that that

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evidence is not in this case, no hint of it is in the case, and no suggestion is made of that.

I know that your Honor concluded and I suppose that looking back at those work papers anybody could conclude that in 1968, when Joe did that audit, that he did a lousy job. Mr. Velie says he is a liar, and maybe we will hear some more about that from Mr. Velie, but when Velie pressed Scansaroli, he said, "Did you do a good job," he said, "No, I have to look back and say I didn't do a good job."

If that is the evidence of his negligence, that's the evidence of his recklessness, then that is not the crime charged. That happened in 1968 and from the time he finished that work until 1969 he was out of touch with this client. The evidence is most clear about that, that between December of '68, when they had this meeting, and the spring of '69 Scansaroli is out working on other clients of Peat, Marwick.

He gets a call in April or May, "Come on back and do some more work on NSMC," and so he does, and I think the evidence clearly reflects the work that he did.

I think insofar as that journal entry is concerned the journal entry shows Scansaroli writing off some contracts of Ron Michaels in 1968, and that's what

happened.

Mr. Velie says that Scansaroli offered this business about the tax credit and he calls it a phony tax credit. But the fact of the matter is, with all due respect to Franklin Velie, there is no evidence in this record from anyone to conclude that it was a phony tax credit.

THE COURT: I am sorry. I think there is some evidence that makes that not necessarily anything but a good jury question. I am frank to say that that tax business I think was very important evidence bearing upon your client's knowledge and everything else. I am not saying that I necessarily would agree with the jury. Maybe I would, maybe I wouldn't. I don't really know. But that is unimportant and beside the point.

That tax testimony in my judgment presented a very fair fact determination for the factfinder. That was not a very good entry. That did show up directly and indirectly in the pages which are the subject of Count 2 in the proxy financials and Joseph Scansaroli had a very important role in all that.

He said so. Mrs. --

MR. STILLMAN: Raimondo is the lady's name, your Honor.

THE COURT: Yes. Mr. Natelli conceded up to

a point, to the extent that he knew, apparently, Joseph Scansaroli was in on that, they discussed it.

MR. STILLMAN: But the testimony was, Judge Tyler -- I say this with the deepest respect for your Honor -- the testimony of Carol Raimondo was that she looked at the papers and she decided that they had improperly set up this deferred tax provision and she decided that it had to come out. So Scansaroli excluded ~~on that~~ it, he took it out. That's the entry that he made.

There is no evidence that Carol Raimondo was somehow a conspirator or something like that.

THE COURT: That's true. She was not, as I understand it, in the Government's theory even, a co-conspirator.

But I am saying that overall that was sufficiently important and unusual in its handling that it does raise, in my opinion, one of the jury issues from which the Government could fairly argue and you could fairly argue to the jury.

MR. STILLMAN: I might also say the indictment doesn't charge anything with respect to the tax credit.

THE COURT: Not in haec verba. But it has a very important part in the very financial entries in the proxy statement which the Government alludes to in Count 2.

We all heard about that. Remember when we had all those exhibits, Government's Exhibit 17 and the variations of Government's Exhibit 17?

True, in the direct sense Mr. Scansaroli had nothing to do with the kind of work that Mr. Natelli was doing in the frantic days of getting this ready. I understand that. But Scansaroli played a very important part in the sense that, after all, he had been the working accountant on the team for a good portion of the time which was relevant to all this, and second of all, taking the tax issue, he certainly was active on that.

MR. STILLMAN: This tax issue boggles my mind, Judge Tyler. The Government nowhere in its indictment nor in its bill of particulars suggested that the tax credit was "phony."

THE COURT: No, I realize that. Of course, they did not, in the direct sense.

MR. VELIE: I believe it is in the bill of particulars, your Honor.

THE COURT: Sir?

MR. VELIE: I believe there is reference to the falsity --

THE COURT: Oh, yes. Literally what he is saying is true. That is my only point. I think it is

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referred to.

But more than that, forgetting the bill of particulars, it is very much part of the plain intendment of Count 2 on its face, because the minute you get into those figures you have got to consider that tax figure. We know that from the evidence in the case.

MR. STILLMAN: What do we do, your Honor, with the fact that, as Mrs. Raimondo testified, she is the tax expert. She comes to Scansaroli and she says, "There is this tax credit."

She said that she spoke to Mr. Holloway. He is the tax partner.

What is he supposed to do at that point. The fact of the matter is he is a working accountant there and he is not a partner. He is working and they say to him, "There is this tax credit, you have to take this tax entry out."

So he takes it out and he puts this one entry down that there is an upward adjustment of the figures and there is a downward adjustment from Ron Michaels, he puts that in his work papers, and we add that up and shake it up and ~~come out~~ if comes out a crime. That is the part --

THE COURT: Fine. I understand that. That could be so argued, and you argued it very, very pertinently to

the jury. But I say also that Franklin Velie's point is really -- and he put it better than I, obviously -- look, it is very, very questionable as to why Scansaroli ever treated that thing the way he did for tax purposes initially.

Finally, it is very, very questionable as to why Mr. Natelli treated it the way he did when they came out with the net out figures for the proxy statement.

You may say, and I understand you, this doesn't amount to much. But again, I think that is a fair jury question.

One has to recognize, and you made the argument, as I recall it, that Scansaroli was not designed to be nor appointed to be nor thought to be a tax expert as such. Even within the confines of PMM he wasn't. I understand that. That is perhaps a point to argue, and you did argue.

Scansaroli presents, I concede to you, a particular problem. As you put it, one would find it hard to say that Joseph Scansaroli was a corrupted man in the classic, usual sense of those terms. I don't think he was. I don't think Joseph Natelli was. But to say that I don't think ends our case.

It is a sad and difficult case. We know that.

As you will learn when you read the pre-sentence report -- you know it, certainly, and even I know it -- Joseph Scansaroli probably never should have left his ~~mone~~ home turf in the Wyoming valley. He didn't get pieces of silver to do something wrong here. We know that. The Government conceded that.

MR. STILLMAN: Judge Tyler, I would submit to you that the man would have been incapable of committing a criminal act.

THE COURT: In the classic corrupt sense that you and I and others here in this room are used to using that phrase, no doubt. But you know what happened. The jury's deliberations on the record are plain enough. There is no doubt. The jury had trouble with just this kind of thing until they had the Judge read his charge a couple of times to them. More than that, I guess; maybe it was even three times.

MR. STILLMAN: Let me just make one final observation and then I will be still, Judge Tyler.

THE COURT: Yes.

MR. STILLMAN: I do think that the problem that we have is that the evidence that we have with respect to carelessness as to Joseph Scansaroli took place in 1968 and no criminal act is charged at that time.

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I think that what may have happened is that the jury may have taken his messy '68 audit and stuck it to him and found him guilty for a crime that is alleged to have occurred in the fall of 1969. Of course, we will never know what happened in there, but it had to be something like that, and I submit if that is what happened, and it seems to me that is the only thing that could have happened, the Government just failed to put in enough evidence to warrant that kind of conclusion with respect to this man.

THE COURT: Mr. Velie, what about this business, this argument that Scansaroli really dipped out of the picture in '69? I don't think you quite accept that, do you?

MR. VELIE: No, your Honor. I think the evidence was plainly sufficient for the jury to find as they did with respect to his activity in '69. In particular, this business of the tax credit was 1969 activity. The writeoff against the non-existent tax credit occurred in April or May of 1969. Thereafter the Pandick Press incident, at which Mr. Scansaroli was as present as Mr. Buck or Mr. Kurek and therefore I think the jury could conclude heard just what they heard. He was present and acted there.

Also, there was evidence before the jury in the form of a grand jury admission read to them that

Mr. Natelli, when the proxy was being prepared in August, agreed that they should not disclose these enormous writeoffs and these enormous losses.

Accordingly, he very much was in the picture and doing things in 1969.

THE COURT: All right.

MR. STILLMAN: Judge Tyler, I am sorry. I am sitting here saying, "Be still, be still." I can't be still.

THE COURT: All right. Speak.

MR. STILLMAN: That's just what he did in his papers. The fact of the matter is that the evidence showed that at the printer Scansaroli was busy working on other things, that he left before anything they claim to be a significant act.

THE COURT: No, no. Let me say you don't have to speak on this.

What his point is, he has conceded one of your arguments, and I think he is fair about this. I don't think the jury even caught the point that just because Buck said he heard what was going on that it means that Scansaroli heard what was going on. I don't buy that at all, and I don't think you need worry about it, because I don't think the jury even got the point, let alone

bought it.

I think what Franklin Velie is arguing, however, there is evidence, and indeed Mr. Scansaroli conceded this, as I understood it, on the stand, that of course he consulted with Mr. Natelli in '69, particularly with regard to the tax writeoff and particularly with regard to some of these later writeoffs of these contracts.

Now, you can say to me, well, that doesn't prove any crime. Maybe it doesn't. But I think the jury was entitled to say, "Look, at that point Scansaroli decided that he didn't want to blow the whistle, if indeed he ever wanted to blow the whistle at all, he never wanted to blow the whistle then," and so on and so on, in line with the Government's familiar arguments on this point.

You say this is all wrong, but as I see it that is a factual determination that could be properly made.

Incidentally, before I rule on these motions, let me say I agree with you, although, as I know personally, I almost forgot about our date today, I certainly agree with you that it is far better to have these motions argued, certainly better than right after a verdict, and even better in a case with any kind of difficulty,

such as this one, for everybody involved, not at the time when we are approaching sentence, if we get down to that point,and I am glad we did it this way because it also gave me time to read your papers.

I don't think, however, that I can say that I am in any way persuaded to change my mind, close as the issues usually are in these matters, and they seem to be close here, as they are in a lot of cases, maybe even more so. Who knows.

But I believe there was sufficient information for the jury to make their determinations as they did, and if you will analyze what we are talking about -- and there is nothing wrong with this; we have to talk about the evidence as we see it -- these are, nevertheless, fact arguments. So for that reason I am going to deny the motions of both Natelli and Scansaroli. Exception of course to both, as a matter of law.

Again, I repeat something on the record that I said to Mr. Stillman yesterday when we were called about the confusion which I created on the hearing today.

Last night the pre-sentence report came up in regard to Mr. Natelli. Mr. Scansaroli's report arrived two days ago. They are waiting and my secretary is waiting to receive you gentlemen whenever you care to go.

MR. MARTIN: Your Honor, I rose to address myself to that issue. My intention is to go from this courtroom up there for that purpose.

THE COURT: I thought you would.

MR. MARTIN: I would, however, request a pre-sentence conference with your Honor, Mr. Velie and Mr. Stillman. My intention would be to read the pre-sentence report today, to submit a brief memorandum together with some letters that I have gathered from friends and associates of Mr. Natelli, and I would like an opportunity to meet with your Honor prior to sentencing.

THE COURT: As you know -- Mr. Velie and Mr. Stillman don't -- since you and I are involved in a sentencing project for our circuit, you know that I have confessed, without fear or favor, to more or less thinking well of pre-sentence conferences, at least in certain types of cases, which would certainly embrace this case. So I have no objection.

I would suggest to you that you chat with Franklin Velie and call me on Monday. I am going to be on trial all day Monday. I won't have any time on Monday.

MR. MARTIN: Would you have any time on Thursday, your Honor?

THE COURT: I think I would. I have a trial on

Thursday, but from what I see of it, we ought to try it in two hours.

MR. MARTIN: Your Honor, I don't think this necessarily would be a lengthy meeting. I think 15 minutes --

MR. VELIE: The problem with it is I am going to take my long awaited summer vacation next week, and I would beg the Court's indulgence, if this is a good idea, to simply put the sentence back for a few days to accommodate me for my first such request in this case.

THE COURT: I can't be opposed to vacations. That is probably unconstitutional.

What do the defendants say?

MR. MARTIN: Your Honor, I have no strong objection to that. I certainly can't fault Mr. Velie for wanting to be away. I have some question as to --

THE COURT: I would think Mr. Rakoff could cover it.

MR. MARTIN: That is my point.

MR. RAKOFF: Your Honor, I am taking not only my long awaited summer vacation, but actually my summer vacation of two years ago.

THE COURT: Please, you will have us all in tears.

MR. RAKOFF: I am only taking two days next week.

I am taking Thursday and Friday. I would be available Monday or Tuesday.

THE COURT: Look, why don't you read the report. I will govern myself either way you say. We will put off the sentence, if need be, or, alternatively, if Mr. Rakoff and you can get together -- as Mr. Martin says, this isn't going to take very long, particularly since the pre-sentence report, as you will find, does not contain any information of a so-called adverse nature whatever. What else? I mean, these men haven't been leading peculiar lives.

MR. MARTIN: Is your Honor going to be here Tuesday afternoon?

THE COURT: I am sort of hoping to get out as early as I can after luncheon, but I am not about to panic if you say right after lunch, for example.

MR. MARTIN: How about 2:00 o'clock Tuesday afternoon.

MR. RAKOFF: That is fine with me.

THE COURT: I would think probably, Mr. Rakoff and Mr. Velie, you should understand that probably, knowing John Martin, he will be pressing the Judge to sort of be dropping a few hints as to what he is thinking at the moment.

MR. STILLMAN: Can I be heard? Why don't we put

this off until after the New Year. We have already done the gift-giving in my home, but I understand others will be doing that next week.

THE COURT: I said, Mr. Stillman, either way.

MR. MARTIN: Your Honor, let us get back to you.

THE COURT: I think that is better. Why don't you read the report and get back to me.

MR. MARTIN: Your Honor, the sentence is set for Friday at 2:00 o'clock. How about Friday morning?

MR. VELIE: I will be here.

THE COURT: All right. Good, 10:30 or 11:00?

MR. MARTIN: 10:30 is fine.

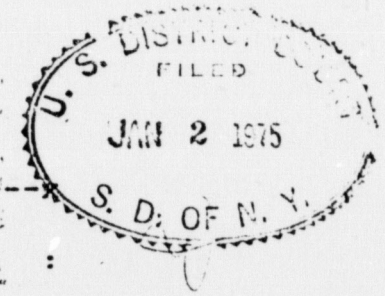
(Adjourned.)

MINUTES OF SENTENCE (NATELLI)

JHRF

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,

Plaintiff,

-against- : 74 Cr. 43

ANTHONY M. NATELLI and
JOSEPH SCANSAROLI,

Defendants.

BEFORE:

HON. HAROLD TYLER,

District Judge

New York, New York
December 27, 1974 - 2:15 p.m.

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney for the
Southern District of New York
BY: FRANKLIN B. VELIE, ESQ.,
Assistant United States Attorney

MARTIN, OBERMAIER & MORVILLO, ESQS.,
Attorneys for Defendant Natelli
BY: JOHN S. MARTIN, ESQ.,
BETTY SANTANGELO, ESQ.,
Of Counsel.

MORRISON, PAUL, STILLMAN & BEILEY, ESQS.,
Attorneys for Defendant Scansaroli
BY: CHARLES STILLMAN, ESQ.,
EDWARD D. TANENHAUS, ESQ.,
Of Counsel.

THE CLERK: United States of America versus Anthony M. Natelli.

Is the Government ready?

MR. VELIE: The Government is ready, your Honor.

THE CLERK: Is the defendant ready?

MR. MARTIN: Defendant Natelli is ready.

THE CLERK: United States of America versus Joseph Scansaroli.

Is the Government ready?

MR. VELIE: The Government is ready.

THE CLERK: Is the defendant ready?

MR. STILLMAN: The defendant is ready.

THE COURT: Mr. Velie, I have read your submissions of you and Mr. Rakoff, as I think you know. Is there anything the Government wishes to say?

MR. VELIE: Yes, your Honor. I will be brief. In addition to the detailed submissions that we have submitted and served on the defendants I would simply like to emphasize two factors in this sentence.

Number one, this case involved fraud in a selling document, that is, the defendants knew that the financial statements that they were preparing would be relied upon by investors who were about to give up millions of dollars of their property in exchange for

National Student marketing stock, and as the jury by its verdict has found, the defendants for personal and selfish motives completely and totally and recklessly and wilfully disregarded their professional obligations to put out financial information which was completely false and misleading.

The second factor is this:

The Government submits that in a sentencing in a case of this nature an important, perhaps the only important overridingly relevant fact is the Court's attention to the factor of deterrence.

This is an important case. It should stand as a reminder to the investing community that they can and should be able to rely upon financial reports which comport with the legal requirements of truthfulness and fair dealing and it should be a reminder to the accounting profession that public accountants are public accountants and that they have an obligation to the investing public.

I think it is fair to say that the principle that underlies the securities law is full and truthful disclosure and that the cornerstone of our free market system is the system of allowing people to market what they will as long as they tell the truth about it and the system will operate as long as investors have confidence

in it.

It is those facts that I wanted to bring before the Court. Thank you.

THE COURT: Mr. Martin.

MR. MARTIN: May it please the Court, I stand before your Honor this afternoon in a unique experience in my professional life because the man for whom I speak has over the last two years become my close personal friend, and like his other friends who have submitted letters to your Honor concerning him, I suppose I have more than the normal professional interest in this proceeding.

I think that the letters that your Honor has received amply demonstrate that Mr. Natelli is a man in his profession who was willing to make hard decisions that at times cost his firm clients, he is a man who in other phases of his life has demonstrated a concern for his community, and in substance, is a man who by his prior actions is a fitting subject for the Court's mercy. I am sure if the only question before your Honor was this man then all of the sentencing criteria would suggest that this is an appropriate case for the imposition of a suspended sentence.

I realize that the question of deterrence,

which Mr. Velie has raised, is one which your Honor must consider, but I respectfully submit to the Court, talking about deterring other certified public accountants from engaging in criminal activity, the mere fact that the entry of this judgment of conviction and the collateral effect it will have on Tony Natelli's professional career from this day forward are known in the profession, those facts alone will provide any deterrent that arises from this proceeding and not from the imposition of sentencing him to prison.

I also think that if you talk about the deterrence of the profession I am perhaps more cynical than Mr. Velie that a single case will have the impact. I think there has been change in the accounting profession over the past years and, indeed, since the events here. I think that results from the fact that the securities laws also provide wide-scale civil remedies to people and accounting firms are being hit more and more often with these civil suits and they are responding to that and they are undertaking changes, such as the creation of the independent FASB to set up some principles by people who are totally independent of the profession.

In substance, I think, on the question of deterrence here, that the imposition of a sentence of

imprisonment would not add substantially to the deterrence that follows from the judgment of conviction entered in this case.

But even, your Honor, if I were to come to the other conclusion, or the Court could come to the other conclusion, deterrence is only one of several factors to go into the sentencing process, and if the defendant before the Court were not a man of Mr. Natelli's proven contributions to society, then society might conclude that it owes him nothing, that there is an interest in deterrence, that therefore some sentence of imprisonment might be appropriate.

But I submit, your Honor, given Mr. Natelli's background and his contributions to society, that society's possible interest in the deterrence of others should not outweigh his other positive contributions and that a sentence of suspended sentence is still appropriate.

Finally, I would simply say the question of deterrence is one that is not subject to mathematical calculation, it is one about which there can be areas of dispute, but there can be no dispute as to the harsh impact of a prison sentence, any prison sentence, on a man and on his family, and if we are to err because we can't weigh all these factors with mathematical

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certainty an error on the side of mercy and leniency certainly would be appropriate.

Thank you, your Honor.

THE COURT: May I suggest, Mr. Stillman, it might be useful for all concerned if I would hear from you, and then we will hear from Messrs. Natelli and Scansaroli, if they so choose.

MR. STILLMAN: If your Honor please, it seems to me that in many respects this case represents what I would consider to be a terribly dramatic illustration of the difficulty, indeed, the sometimes impossible role of the public accountant who is in the course of his work victimized by overreaching by his client and at the same time that public accountant is perhaps less than careful on the work that he is doing.

I know your Honor has talked about deterrence, Mr. Velie has talked about it and Mr. Martin has talked about it, but I respectfully submit, your Honor, that the fact of the verdict of conviction in this case has had the kind of deterrent effect that we could fairly seek in looking upon that item as an aspect of sentence.

I would like to bring to your Honor's attention something that came to my attention and that is a

commentary on this verdict in this case in a release by another major public accounting firm. In that release, your Honor, that public accounting firm reported, and I am quoting, "One defendant, Joseph Scansaroli, the audit supervisor, conceded that he had been far too easily satisfied in his 1968 audit of National Student Marketing."

That release by this public accounting firm, your Honor, to its staff and to its accountants, went on to say, "It is imperative, therefore, that we constantly ask ourselves, "Am I too easily satisfied."

I submit that with respect to Joseph Scansaroli, your Honor, that question will be on his lips and in his thoughts for the rest of his professional life.

Finally, your Honor, so far as I am concerned, it is with humility and yet pride that I speak to you on behalf of Joseph Scansaroli, and I say that because of my respect for him and my admiration for him as a client and as a friend, but frankly, your Honor, I think that two or three excerpts from the letters submitted to you really speak more eloquently of Joseph Scansaroli than I am capable of.

"As we were growing up together and while we were living together in Washington, D.C. we attended the same church every Sunday and to this day Mr. Scansaroli

does not miss a Sunday church.

"Mr. Scansaroli's father was a coalminer until his retirement. He did not have adequate funds to send his three children through college and on his own Mr. Scansaroli worked his way through college with the aid of a GI bill and a part time job. After completion of his college he aided his father in sending his brother and his sister through college."

Finally, your Honor, "I have known Joseph Scansaroli for 12 years. He has worked for me in performance of audit assignments with Peat, Marwick, Mitchell & Company. His work in my opinion was always thorough and performed in a conscientious, professional manner. He would not knowingly commit a crime. He is not a criminal. I have the utmost confidence in his integrity. I would trust him in any situation. I love Joe Scansaroli as I do my brothers."

I have nothing further to add, your Honor, unless you have some specific question.

THE COURT: Thank you.

Mr. Anthony Natelli, under the system, as I am sure you know, despite the fact that your lawyer, Mr. Martin, who has been eloquent and steadfast at your side during the trial, and, indeed, for longer, has

spoken for you, you are entitled to speak and say anything you care to at this point. Would you like to say something?

DEFENDANT NATELLI: The only thing I can say, your Honor, is that as I stand before you I must tell you that any decision that I have made in connection with any work that I have done on NSM I made in good faith at the time and never did I do anything that I thought would be harmful to anybody.

Thank you.

THE COURT: All right. May I say the same to you and extend the same invitation to you, Mr. Scansaroli.

DEFENDANT SCANSAROLI: Yes, sir. I have nothing. Mr. Stillman has over the past couple of months said everything that I could possibly think of.

THE COURT: All right, sir.

This Court has received, as you gentlemen know, a number of letters from people of undoubtedly first rank reputation in their business and professional and social spheres. These letters have been, in the judgment of the reader now speaking, at least, completely sincere, truthful and well meaning, as far as they go. Indeed, I might say some of them are flawed only by something which occurred the morning after the verdict in this case

and which misled the writers, I am afraid, and I want to comment about that, because it was a troublesome episode which I anticipated, unfortunately, due to the mores' of American legal and corporate life, and that is a press release which suggested by a spokesman for Peat, Marwick & Mitchell that the verdict was a result of hopeless confusion or confusion of some kind on the part of the jury which rendered the verdicts in this case. These writers mentioned that press release.

Nothing could be further from the truth than alleged in that unfortunate press release. I recognize that Peat, Marwick had a constitutional right to speak as they did through their spokesman, but the fact that they have that right does not make that press release and its contents impressive, because in my judgment nothing could be further from the truth in any respect during all of the proceedings in that case than that remark.

I hasten to add, Messrs. Natelli and Scansaroli, I am confident that neither you nor your lawyers had anything to do with the decision to utter that release. I might even say I don't really particularly hold it against Peat, Marwich, because this is the kind of thing that is thought to be the thing to do by lawyers and business men in our society, and they are not alone in that. But

it did flaw these otherwise excellent letters, in my opinion, which were written on your behalf.

Not only that, but as I told your lawyers this morning, I think you are absolutely sincere when you say that you do not believe that you did anything wrong in this audit or audits for National Student Marketing. After thinking about the matter for a long time I think you honestly mean that. But the tragedy is that the jury found that this was an audit or audits done with reckless disregard for what was really involved. We know that because of the record showing what it did in the jury deliberation.

I am frank to say that I don't suppose in my experience as a nisi prius judge for almost 13 years that I have probably dealt with any two men who are more generally reputable, and deservedly so, than you are. I understand that. Not only that; you are both, in my opinion, extremely sympathetic figures. I speak as a member of a profession whose shortcomings have been demonstrated most graphically by recent public events that I need not describe in any more detail.

I mention this because I think that the profession of accountancy has failed just as badly as some aspects of the legal profession have failed in understanding their

public responsibility. I have told your lawyers about my views of this matter because as far as I can tell, the only legitimate purposes or objectives of sentencing in your cases are both deterrence general and deterrence special, as Anglo Saxon legal and correctional scholars have formulated those concepts for at least eight centuries.

It would be monstrous for me or anybody else, I suppose, to suggest that we should punish Anthony Natelli and Joseph Scansaroli with a view toward rehabilitating. First of all, your good works are a matter of record and your apparent sincerity, peculiar as it may be to me and others, is a matter almost of record.

In the case of Mr. Natelli in particular, and to a certain extent in the case of Mr. Scansaroli, you have not only had impeccable reputations, but you have profited handsomely by your labors, which have been considerable. The practice of your profession is extremely difficult, tedious, demanding, as your wives know, I am sure.

The tragedy is that two things, without more, in this case I am sure enabled the jury to reach its verdict. One was the work papers which you made. Two was your own testimony on the stand. It has been said that

there were other important witnesses. Perhaps they were important. But in my judgment they were not as important as those two types of proof.

I am afraid that one of the problems this Court faces in imposing sentence is to avoid casting upon your shoulders an opprobrium which is really shared by many, many people in your profession and, indeed, in other professions, including my own, some sort of myopia as to what is really the public responsibility of an accountant who performs services as a public accountant. I seriously doubt that you are any worse than many in your profession, and, indeed, I suspect you are much better than they; certainly as individuals I am almost sure you are.

Your friends, your family, have written very movingly about you. I do not profess to have the wisdom of Solomon. I am well aware on a cool day like this that I don't. I really feel that this is one of the most difficult sentencing problems that I have ever heard of, let alone encountered. I don't mean to apologize or to fob that off on either one of you men. I saw the anguish of your families as the trial unfolded, I saw their anguish and yours when the verdict was reached. It was a difficult day.

What I have tried to do in fashioning sentence is to make sure that I don't try as an agent or officer of this court to wreak upon you all of general deterrence in its full theory, which would be monstrously unfair to you as otherwise extremely decent, high type citizens. That is a balancing job which I am sure many will disagree with me on, and I can well understand the disagreement when it comes.

Anthony Natelli, please rise.

This Court imposes sentence upon you as follows: Pursuant to the provisions of Title 18 of the United States Code, Section 3651, this Court sentences you to the custody of the Attorney General of the United States for a period of one year, but I suspend execution of all but 60 days of that sentence and direct that the balance there of be deemed an unsupervised probationary period.

This Court also fines you the sum of $10,000, which is to be regarded as a committed fine. It is to be paid within 60 days of the entry of the judgment, or if there is an appeal, as I anticipate there will be, 60 days after all time for final appeals has been exhausted, assuming the conviction is affirmed.

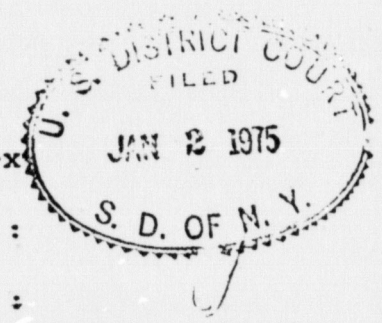
I am going to stay execution of all phases of the sentence, of course, in anticipation of an appeal.

Now, under the law, even though I am sure Mr. John Martin has told you this and you probably know it yourself, you have a right to appeal. I know your financial situation, and therefore I am not trying to be ludicrous or funny at a difficult time like this for you and everybody else, but I must advise you under the law that you have a right to appeal at Government expense if you can't afford an appeal and the appointment of a lawyer to represent you on appeal and so on.

You should make application for such relief if you think that is what you are entitled to.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,

Plaintiff,

-against- : 74 Cr. 43

ANTHONY M. NATELLI and
JOSEPH SCANSAROLI,

Defendants.

BEFORE:

HON. HAROLD TYLER,

District Judge

New York, New York
December 27, 1974 - 2:15 p.m.

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney for the
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MORRISON, PAUL, STILLMAN & BEILEY, ESQS.,
Attorneys for Defendant Scansaroli
BY: CHARLES STILLMAN, ESQ.,
EDWARD D. TANENHAUS, ESQ.,
Of Counsel.

THE COURT: Mr. Joseph Scansaroli, please rise.

Mr. Scansaroli, before imposing sentence I want to say something which moved me a great deal particularly about your situation. In many ways you have achieved many principles of specific and general deterrence, which I ~~conceive~~ conceive to be the only legitimate objectives of sentence here, in making the determination to get out of a big firm such as Peat, Marwick, return to the Wyoming Valley, to the place of your birth, among your friends, and to practice accountancy there with your brother. This is one of the reasons why I have been extremely troubled about what to do in your case.

I know you are a decent man. I heard the witnesses who are your friends who came to trial. I observed you first-hand. It is not, in my judgment, a clear-cut decision because of these factors. I think you were extremely well advised to do what you did and I have to recognize that. I told Mr. Stillman this this morning in conference.

It is most troublesome, as it was in the case of Mr. Natelli, for other reasons, but here I want to recognize this in your hearing. I am so pleased for you that things that have worked out and I know they will continue to work out back with your old friends and neighbors,

who all revere you. They really do. Those letters show that so plainly. And I don't blame them.

But, sir, as you yourself were frank enough to admit on the stand, certainly in hindsight, this was not a good audit, and you let certain things go on that you knew well, decent man that you really are most of the time, were not sufficient unto the day, particularly given the machinations of some of those officials who pled guilty in our case.

I have struggled and I probably will always struggle with what is the right thing. Owing to my infirmaties as a human being, this Court imposes sentence as follows: Again pursuant to the provisions of 18 USC, Section 3651, I sentence you to the custody of the Attorney General of the United States for a period of one year, but I suspend execution of all of that period save for ten days, the balance of that period to be served on an unsupervised probationary term.

I fine you the sum of $2,500 as a committed fine and I give you the entire period of your probation to pay that fine off in accordance with a schedule to be worked out between you and the probation arm of this court.

Now, in your case I must also advise you,

even though it may be irrelevant as a practical matter, but I must advise you under the law that you not only have a right to appeal, but you have a right to apply to appeal as a poor person and make application here and if you satisfy the requirements you may appeal with your fees and expenses paid and the Court will appoint counsel for you.

Now, Mr. Martin and Mr. Stillman, I would ask you, as I know you will in any event, to file a notice of appeal on behalf of your clients, if that is what they desire, and I assume they do, within ten days from today.

MR. MARTIN: It will be done, your Honor.

MR. STILLMAN: Thank you, your Honor.

MR. MARTIN: I take it the defendants are released on their own recognizance.

THE COURT: I am sure, but I better ask. I am sure, Mr. Velie, you would have no objection to that in these cases.

MR. VELIE: No, your Honor, I do not, no objection.

THE COURT: That disposition gentlemen, will be continued.

MR. MARTIN: Thank you.

(Adjourned.)

MINUTES OF SENTENCE (RANDELL, KELLY AND BUSHNELL)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

Plaintiff, :

-against- : 74 Cr. 43

CORES W. RANDELL, DENNIS M. KELLY and ROBERT C. BUSHNELL, :

Defendants. :

----------x

BEFORE:

HON. HAROLD L. TYLER, JR.,

District Judge

New York, New York
December 27, 1974 - 2:45 p.m.

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney for
the Southern District of New York
BY: FRANKLIN B. VELIE, ESQ.,
Assistant United States Attorney

ROBERT L. WEINBERG, ESQ., and
FRANCIS GRASSI, ESQ.,
Attorneys for Defendant Randell

THOMAS A. BUTLER, ESQ.,
Attorney for Defendant Kelly

ANDREW LAWLER, ESQ.,
Attorney for Defendant Bushnell

(Case called.)

THE COURT: Well, Mr. Velie, again we have ample written material from you and from all the defendants. Is there anything you care to add?

MR. VELIE: I will be very brief, your Honor. With respect to the Defendant Randell, the Court will of course recall from the written material supplied that Mr. Randell was at the very center of this scheme which has been proved to you in the trial and also on the other written submissions that we had made.

He was at the center of the scheme as its moving worker or architect. He was the person who profited mightily at the expense of many victims, and he is the person who by personal acts of forgery and alteration of documents cause this scheme to be as dangerous and as complete and as damaging as it was.

With respect to Defendant Kelly, as the Government's submissions have shown, your Honor, Mr. Kelly was a person who knew that Mr. Randell had prepared the Pontiac forged letter, which was part of the scheme to defraud the investors, and he himself obtained the false and fraudulent Eastern Airlines contract. He acted in this fashion, the Government believes, because he had powerful motive in that he believed his own holdings

of National Student Marketing stock obtained at low prices, the value would be enhanced and he would be able to enrich himself.

With respect to Mr. Bushnell, similarly, a powerful motive to join the scheme and as the Government's written submissions have pointed out, Mr. Bushnell was instrumental in obtaining a false and fraudulent large contract purporting to be from American Airlines; and was a conduit for payments under the table to officials of American Airlines.

Unless there are questions, I believe I have nothing further to add at this time.

THE COURT: No, I think I'd like to hear next from counsel for Mr. Randell.

MR. GRASSI: May it please the Court, your Honor, I would like to speak at some length to the question of the ground of the offense because I think the Government's memorandum lays rather heavy stress on that.

THE COURT: You are Mr. Grassi?

MR. GRASSI: Mr. Grassi, yes, your Honor.

THE COURT: Mr. Grassi, may I remind you that I have received ample and, if I may say so, and I don't criticize you at all, but I have received a great deal of response to this already in writing, and these will be

filed documents and repetition in my opinion at a time like this would serve little advantage for anyone.

MR. GRASSI: All right, your Honor.

THE COURT: You know, anything that you haven't put in writing, fine, but since you have been good enough to go to all that trouble, I don't see why we should burden the record with any repetition.

MR. GRASSI: Your Honor, I think I'd like to lay emphasis on two facts, two facts which point to the context in which these offenses were committed.

One was the rather unusual stock market conditions in 1968 through 1970. In fact, when the company first went public in 1968, in April, on the first day of trading, the price rose from $6 to $12, and within a few months it also dramatically rose to over $70; and this was before the unbilled receivables came to be.

This was before any fraud came to be committed. It reflected a rather volatile market and a frenzy over new issue stock.

I think the second important factor is the -- and I am sure your Honor is most familiar with this -- is the fact that the accountants unfortunately were too compliant and too willing. The 1969 audit resulted in booking of unbilled accounts receivables based upon the

commitments which later failed to materialize, and Mr. Randell, at the later date when the unbilled receivables did not materialize, took certain steps to try to shore up the profits of the company.

I think at all times Mr. Randell was motivated by the effort to achieve, the effort to make the company successful, the effort to benefit all shareholders.

THE COURT: May I ask Mr. Grassi, although I agree with you, this all unfolded during a definite market period essentially as you described, I don't quite understand the force of that fact as pertains to Mr. Randell, at least in the beneficial sense.

MR. GRASSI: I think it is important, your Honor, because the so-called enormity of the loss, the enormity of the fraud, is not that enormous when you consider the fact that other comparable stocks plummeted --

THE COURT: Right, yes, I see.

MR. GRASSI: -- during the same period.

THE COURT: I think there is truth in that, I am sure.

MR. GRASSI: It also had an effect on what certain people received for their businesses. For example, Mr. Frommer, whom the Government cites in a memorandum, he received an enormous amount of what would

would have been cash for his company had the stock been converted to cash, so because of the high multiple price-earnings ratio between the NSM stock, these people were given an enormous amount of valuable stock which later turned out to be not so valuable for their companies, and even if they cashed a small portion of it, as Mr. Frommer did, he received $500,000 in cash, he was not left holding an empty bag as the Government contends.

THE COURT: Well, put it this way, I accept your view that the Government may have overstated the case here. In other words, as you say, no doubt there would have been some tremendous shrinkage in these stock prices in any event, and also Mr. Frommer, for example, didn't come out quite as impoverished as the eloquent counsel for the Government would suggest, and that was brought out rather effectively in the trial of the cases of the two accountants, as you may know.

I think that I accept that.

On the other hand, I don't think we can deny the basic point the Government is making. This was a rather unfortunate impact for a lot of people because the price was driven up by these drum fire of acquisitions at a time when the basic company wasn't making any money,

and the skillful interrelationship between press releases, press conferences, and acquisitions, drove it up as high as it went, no doubt.

MR. GRASSI: It did contribute to its rise, your Honor, although it did start out --

THE COURT: No doubt whatever.

MR. GRASSI: Although it did start out at a rather high price-earnings ratio before that occurred.

THE COURT: Yes, I'd accept that and certainly you and I would then probably agree in hindsight one wonders why anybody would ever pay that kind of a price --

MR. GRASSI: Precisely.

THE COURT: -- for any kind of security, but still it did happen.

MR. GRASSI: Your Honor, I'd like to conclude by noting that I think Mr. Randell has fully acknowledged his guilt in this matter, he has given a full accounting, and he is attempting in the last five years to seriously reform his life.

Despite living under the stigma of this case for the last five years, when he and his family have suffered daily humilation, he has acted and conducted himself as an upstanding and highly regarded citizen, as I believe the many letters that the Court has received amply

demonstrate.

THE COURT: Yes, and indeed as you say, he is also, as far as -- and the Government has been frank enough to confirm this -- that he has been informative, particularly in the period post-plea, and I think you are right, he is trying to restructure his life, and I have tried to factor that in.

It is again, albeit for slightly different reasons, and slightly different emphases, we have again here in respect to Mr. Randell, for example, the problem I was trying to illustrate in respect to the two accountant defendants. Here is the kind of a man, and this applies to Mr. Kelly and Mr. Bushnell, that you and I and anybody else would assume and believe is the most effective, top-flight type of person or however you want to put it; and probably is and has been most of the time.

The problem is to deal with the enormously important events which led to these convictions on their plea.

MR. GRASSI: Your Honor, I think, as I tried to put forth in my memorandum, I think that the way that this particular economic offense was committed, that at the point of deterrence, the point of jail, is not going to have, I am afraid, that much effect on future similar conduct, because I believe that Mr. Randell believed

that he was good-intentioned and believed that in the end everything was going to turn out all right and that no one was going to get hurt, and probably did not comprehend the risk, and probably did not grasp the wrongness of his conduct at the time that he did it.

And if I thought that jail would restore anyone's monetary losses I could recommend it; but I think that jail in this kind of case does produce human waste and has a marginal benefit to society.

THE COURT: Well, I would say to you and Mr. Randell that I would accept that, within limits at least. It is probably a waste to have a man as efficient, energetic, attractive, as Court Randell languishing in any prison; but it seems to me a Court like this one has to think in terms of not only general and specific deterrence but also punishment or retribution, because the effects of this kind of conduct are really very much greater than maybe 60 or 70 larcenies in a big city like this that undoubtedly go on just as we are sitting here this afternoon.

Egregious as those separate larcenies may be for the victims thereof, they are probably in terms of social impact by no means as important as this kind of a scheme.

MR. GRASSI: Well, your Honor, again I would stress that in the end result the people that sold their companies to NSM, see it wasn't a situation where those companies were -- the profit was skimmed or assets were withdrawn. Those companies are still there today in essentially the same form that it was given to NSMC four or five years ago.

So that the hyperbolic suggestion that they are holding an empty bag I think is not true.

THE COURT: I have already agreed with you the bag is far from empty. I accept that, but I don't think that avoids the real problem here, and believe me, I don't like saying this, because anyone such as I who has got an occasional glimpse of Mr. Randell, Mrs. Randell, this is extremely unfortunate. I mean it cuts across my notions of how life goes, and how it should go. Yours too, I am sure.

MR. GRASSI: I think your Honor is cognizant of the facts and I won't dwell on them any more. I would want to point out that an intimate friend of Mr. Randell, Mr. Andrina accompanied him here today and asked me if I would ask the Court if the Court would be willing to listen to Mr. Andrina talk about Mr. Randell's life in the last three years very briefly and very

succinctly.

THE COURT: Well, I don't wish to be rude or categoric, even, in rejecting Mr. Andrina's suggestion but I have been the beneficiary of a number of materials of that nature, most importantly I think, Mr. Randell's own letter to Mr. Best, which I thought was most revealing and indeed helpful in providing insights.

I don't normally take speeches on behalf of the defendant, no matter how well intended, and they are well intended, I know that; I only take letters because my struggles are not just here in the courtroom.

More importantly, they are elsewhere when I am thinking about this material. So I am sorry to say I must reject his offer.

MR. GRASSI: Thank you, your Honor.

THE COURT: I hope he will understand.

Now, can we hear from counsel for Dennis Kelly?

MR. BUTLER: Your Honor, my name is Thomas Butler and I represent Mr. Kelly. In view of the comments which you have just made, we will try to limit our statements; I would like to point out that Mr. Kelly's family is here, his mother and father from the midwest to be with him in this very troubling hour both for the Court and for Mr. Kelly.

I do think that Mr. Kelly did commit two wrongful acts. That it is necessary to put those in its proper perspective. I think your Honor recalls '68 and '69. They were wild years on the stock market. In fact John Brooks called them the go-go years.

At that point I think the speculation had hit its highest point in the history of the United States. The brokerage firms I believe downtown completely lost their morals, as well as many legal and accounting firms.

And I think that they must bear some of the responsibility for what happened here, when a stock like NSM, your Honor, was selling for 140 times earnings.

THE COURT: Well, as I said to Mr. Grassi, you and I and he and everybody else were armed with 20-20 eyesight would say, "Gee, how come anybody would ever buy a stock of that nature," no matter what it was.

MR. BUTLER: It was an incredible period, to say the least.

THE COURT: We accept that.

MR. BUTLER: Mr. Kelly started with NSM when NSM stock was soaring. He left in 1969, he was there for a year, during which time he was involved in the Pontiac transaction which your Honor knows, and his failure there was to speak out when he should have spoken, but

the Pontiac contract was written off the books of NSM.

On Eastern, again he should have spoken out but he didn't; and for that he is deeply sorry.

The Government says that his motive was to make money. I think it is important to point out that Dennis left NSM a paper millionaire in 1969 only to find himself a few months later broke and in debt. NSM stock he pledged for loans was valueless. Debts incurred in anticipation of being easy to pay off became millstones around his neck. He was out of work, broke and discredited in the financial community.

Dennis has worked for four years, your Honor, to reestablish himself; and he has succeeded. He started with a few dollars and no aid from any bank because no bank would give him any credit in face of the indictment and he built a company called JBT Chroma into a major force today in the heat transfer business; and he has done this by working 15 hours a day seven days a week.

He now employs eight people at that firm. I do not believe that incarceration is necessary to punish Dennis for his wrongs. In fact imprisonment even for a short period would destroy his business and he would have to start from scratch again.

It has taken him four years to get where he is

today because of the NSM debacle. No telling how much longer it would take him to reestablish himself if he were imprisoned. When you think of what Dennis did, I think it is wrong to conclude from that that he was responsible or his acts were responsible for the collapse of NSM. I think it might be important to the Court to note that the collapse of NSM followed an article in Barron's which was written on December 22, 1969, and that article reported that the company was including earnings in its report for acquisitions which it had not made yet.

Smart Wall Street people who bidded the stock up, and this includes the key houses on the street, Smith, Banner, W. E. Hutton, Kidder, Peabody, they bailed out, and when they bailed out down went the stock.

But it was not the acts of the Pontiac contract nor was it the Eastern contract which led to that dramatic loss.

I know many letters have been submitted on Dennis' behalf, and that each of them indicate the high regard which people hold him in; and they indicate his valuable contributions to society. He has served in the Armed Forces of this country and never except for NSM has been involved in any wrongdoing.

He has confessed to his wrongdoing, and he has aided the Government in the pursuit of others. A very, very trying thing because of the people involved who were his very dear friends. I have come to know Dennis very well after working with him very closely over the last two years. I might say, your Honor, that he hasn't been able to pay us but our devotion to him has been because we believe in him, and I personally know how he has suffered. Every time we have negotiated contracts, tried to purchase designs for his business, or obtained credit from suppliers, we inform the parties of the indictment, and oftentimes this was enough to prevent the transaction.

But Dennis persevered, and he has succeeded. It is my firm belief that he is deserving of the mercy of this Court, and I hope this Court in its wisdom will find just cause to bestow it on him.

THE COURT: Thank you.

Mr. Lawler:

MR. LAWLER: Yes, your Honor.

Your Honor, Mr. Bushnell has pleaded guilty to one count in this indictment which calls for a maximum of a two-year sentence. I think the reason that the Government thought that the one to two-year count was

appropriate in this case is best summed up by the last sentence of the Government's sentencing memorandum concerning Mr. Bushnell in which they indicate in part that it appears doubtful that he, Robert Bushnell,would have information about most parts of the National Student Marketing fraud.

Your Honor, on a personal level, I know that the pre-sentence report which your Honor has indicates the serious financial problems that Mr. Bushnell presently faces. He has six dependents. He is the support of five children. The family has serious medical problems. He has been unable to pay some of those medical bills, and because of these financial difficulties, he has been unable to provide the family with certain basics I think he feels that every family should have.

I know this pre-sentence report indicates that his wife is totally supportive of him, despite these problems.

THE COURT: Incidentally, I should tell you and Mr. Bushnell that I received just before I came down to court Mrs. Bushnell's letter which I have read.

MR. LAWLER: Thank you.

Your Honor, as we approached today, I know Mr. Bushnell's primary concern was the effect that anything that happened today would have on his family.

His primary fear was that what happened today might affect his ability to maintain his job. One of the bright spots in his life for the past year has been the job itself. His employer has backed him up 100 per cent. His employer has forwarded a letter to your Honor which is most complimentary, but I think we have to be realistic and business is business. If Mr. Bushnell was unavailable for any period of time, I think this position which he holds would be shortly filled.

It is a small company and one that cannot survive without key personnel for a while, for any length of time.

And I know the prospect of being a 42-year old salesman with a felony conviction looking for a new job in this economy is something that would keep any man awake at night and I know has caused Mr. Bushnell many sleepless nights.

Your Honor, I can assure the Court that Mr. Bushnell has suffered greatly as a result of this incident, as a result of this conviction. Initially when sentencing was scheduled for December 27th, I gave serious consideration to asking for a short adjournment only because of the children and it being a holiday season. It quickly became apparent to me that the

pressures of this sentence, the anxieties over whether he would be able to continue to provide for his family, were such that I could not request such an adjournment.

THE COURT: I think this is important for everybody, and it is often overlooked, but the fact that a sentence is hanging over a person is very difficult.

MR. LAWLER: Terribly difficult.

THE COURT: This is one reason why I insisted that we go as quickly as we could even though I am away that this is supposed to be the holiday period and so on, but I can appreciate his feeling the way he did.

MR. LAWLER: Your Honor, in brief I would ask the Court to be lenient in imposing any sentence on Mr. Bushnell, because I fear that the economic conditions of even a short prison sentence would inflict damage and would inflict problems upon the family far in excess of any punishment that the Court would ordinarily intend to impose.

Thank you.

THE COURT: Mr. Courtes Randell, even though you had Mr. Grassi speak eloquently for you, and as you know, we have had friends and so on submit letters for you, you have every right to speak to the Court before the Court imposes sentence in this case. Do you care

to say anything?

DEFENDANT RANDELL: Yes, your Honor.

Three months ago, your Honor, I pleaded guilty in this court, to the act that I had taken in 1969, five years ago. I stand guilty of those actions today. I recognize my fault, and because of what has happened, I am a changed man from what I was in 1969. The sheer realization that I could commit an illegal act and break the law was enough to shock me into reevaluating how I got swept up into the event of 1968 and '69, and my temporal values then of success and earning money has changed to spiritual values as represented by those letters.

Spiritual values of love of my Lord, love of my family, and love of my fellow man.

I know what the consequences of the actions, these kind of actions are, your Honor, now, because the last four years have been a living nightmare for me and my family; and the suffering that we have gone through and how my friends and wife and family have supported me during this time. The difficulty in finding employment, trying to make ends meet, trying to make amends and settle with the IRS and the class-action suits, so that the past would be done with, I am a productive citizen now. I have a job, a good job for two years, I am very active

in community affairs and my church work. I have been in the process of working with 200 youth in Virginia and many other church and community activities, and I cannot be a productive citizen if I don't have my freedom. And I don't see any benefit to society if I don't have my freedom and I beg of you to let me continue to be a productive citizen.

Thank you.

THE COURT: Mr. Randell, I am convinced that you have looked inward and you have come to a resolution of your own problems in this area; and as Mr. Grassi pointed out, in many ways it is true the mere thought of removing you from your normal milieu is really a form of clear-cut waste, not only for you but for everybody you are involved with socially and businesswise. I know that.

Another way of putting this is to weigh what I said to Messrs. Natelli and Scansaroli. I am sure that looking upon any one of you gentlemen, one would say, and certainly I say, there goes somebody who I would regard as a top-flight individual, a leader of his business endeavor, or his professional endeavor, and he certainly is doing good things without even knowing it.

And it makes the problem extremely acute. I

know the suffering that you have gone through and these other men have gone through and their wives have gone through, and in your case your father, who apparently was blameless in all this, and who has a very fine record in the past in other things he has done. It must be enormously difficult but the Government is clearly correct, and your own admissions on your pleas to the four counts which you pled guilty to three months ago make it apparent that you were the principal actor in all of this. It couldn't have worked otherwise.

Some of the things which you did were enormously wrong. You know it. I would say to you and to all interested that I am not about to think that any prison term or any fine or any probation or anything that this Court has the power to do in a sentencing context is going to rehabilitate Cortes W. Randell. That is foolish. You will rehabilitate yourself and you are undoubtedly already well along in that endeavor. I understand that, and your dear wife is assisting in that regard better than I or any part of the criminal justice system could ever hope to achieve.

But the fact is again here the concerns are deterrence. I know Mr. Grassi is right when he says this was a period of wild goings-on in the marketplace

that we can only marvel at as we look back at them, but the fact is that is not any sufficient excuse. The courts must punish people who take the steps that you did to build up NSMC, knowing full well that these commitment letters were an absurdity in their conception, and worse than that, were totally fraudulent. It was a form of name dropping on paper in effect.

Now we are all guilty or many of us are guilty of some kind of name dropping in this world but for Heaven's sakes, commitment letters with such household name firms as Eastern Airlines and General Motors are a pretty frightening kind of fraud, at the time and in retrospect.

I am frank to say that I thought of imposing the maximum sentence upon you even though you pled guilty, but then I thought of the things that you so eloquently mentioned and that you wrote in your letter to Mr. Best, which was a good letter. I thought of your wife and I thought of your father and I thought of everybody else in the family and I thought that I could not recede however from a punishment sentence or a general deterrent and a specific deterrent sentence in your case.

Hence, Mr. Randell, this Court imposes sentence

upon you as follows.

On Count 1, 2 and 8 I sentence you to the custody of the Attorney General of the United States for a period of 18 months, said sentences to be served concurrrently. In respect to the last count to which you plead guilty, Count 11, I suspend sentence and place you on probation for a period of three years unsupervised. Said period of probation however to be subject to a standing probationary order of the Court, and of course to follow your release from confinement on the concurrent sentences. You and your counsel should take note of my awareness that I am not imposing sentence under Section 4208(A)(1) or (2) because I feel that to do so might penalize you. I want you to be eligible for favorable parole consideration after completion of one-third of your term.

I think that would be appropriate and I so say on the record, whereas if I use one of these supposedly more generous sections, I don't think you would be considered for probation at all at that time.

Mr. Grassi, I think, understands me.

MR. GRASSI: Yes, your Honor. Your Honor, could I ask for a recommendation to Allenwood, Pennsylvania for Mr. Randell, on your judgment of conviction?

THE COURT: No, I am prepared to do it. I will so recommend; the Allenwood Correctional Facility in Pennsylvania.

MR. GRASSI: May I also ask for a two-week stay to permit Mr. Randell to surrender at the institution?

THE COURT: What specific date do you have in mind?

MR. GRASSI: January 13th, your Honor, is a Monday after the Superbowl.

THE COURT: I hope that is not the reason.

MR. GRASSI: No, I just picked that as the first Monday morning two weeks away.

THE COURT: I don't want to diminish the great national indoor sport but I don't think that really is a good reason.

MR. GRASSI: No, your Honor, I just said that facetiously.

THE COURT: Yes, all right, I accept that. Very good, I, however, do feel that it might be cheaper for everybody and easier if -- and I guess this is what you are asking, Mr. Grassi, that he surrender at Allenwood.

MR. GRASSI: Yes, your Honor.

THE COURT: I will so direct and that he do so no later than high noon on January 13, 1975.

MR. GRASSI: Thank you, your Honor.

THE COURT: Mr. Kelly?

MR. KELLY: Yes, your Honor, I would like to say that I am truly sorry for my wrongdoing and as I have expressed, I believe in the letters that I have sent in, and so on, I feel that I was not putting events in perspective, and I am truly sorry for it. I'd like to say that as Mr. Butler has pointed out, things have been difficult for me, and I have, I believe, tried to do my best to make amends in what ways I have been able to up to this point and feel that through what my company is currently doing, we employ eight people, these people are of minority backgrounds, two of these people came through an organization which -- its sole purpose is to work for the rehabilitation of criminals and to place other young people in jobs and get them back on the road.

We have successfully worked with two people in that regard, and I have plans to work with many others, and I would like to carry out that program in as broad a way as I possibly can, and I beg for your mercy, so that these people are not hurt, business does not go down the drain,and I can be a constructive member of society.

THE COURT: Well, Mr. Kelly, you will be, and everything you have hit upon is certainly important, and

I don't deny your sincerity, you have done a lot in the years since this NSM-NSMC situation broke. I would say to you all the things I said to Cortes Randell, for example, and yet what you did here, though your involvement was not as overwhelmingly as central and as important of course as Mr. Randell's, nevertheless you were a key and willing figure in some of the most improper conduct of all, and I don't think a court like this can ignore that.

The courts are singled out occasionally these days and for no doubt with some considerable force behind the criticism that we do not treat white collar offenders the same as blue collar offenders. I think that is a legitimate point in certain situations. It comes to play here in the negative sense, in that I regard what you did just as seriously if not more so than a common law form of larceny or burglary, which very frequently in our state courts the persons who perpetrate that kind of crime get very severe sentences; more severe than the law would even allow here in this kind of a crime for which you have pled -- to which you have pled guilty.

Now obviously it would do no good in the sense of rehabilitation to send you to prison or fine you or do anything else the law permits. I understand that. I also recognize the force of what you say, that it

it would be a waste in a sense, and it would be, to put you in prison, but it seems to me the duty of this Court is to balance the deterrence and punishment features which I think are still very important if not the most important things, or objective in sentences of this kind.

I have tried to be as merciful as I can. I would not blame you if you thought I were not merciful enough but I have to be aware of these public objectives which I believe the courts must consider in their role as sentencers. Therefore with those considerations in mind, Mr. Kelly, you remember you pled guilty to Count 1 only, and this Court sentences you as follows:

I sentence you to the custody of the Attorney General of the United States and I fine you the sum of $10,000, the maximum fine, and I will make that a committed fine. However, I will give you 60 days within which to pay it.

Now, I want the record to show as it did in the case of Mr. Andell, that this is to -- I am purposely not imposing a sentence under 4208(a)(1) or (2), I am imposing a straight sentence under Section 4202 of Title 18.

MR. VELIE: Excuse me, your Honor, I didn't catch the length of the sentence.

THE COURT: I didn't give it?

MR. VELIE: No, your Honor.

THE COURT: I meant to say ten months. I sentence you to the custody of the Attorney General of the United States for a period of ten months. Now that sentence as I said is to be regarded as what lawyers and judges call a straight sentence. I believe that you should be favorably considered for probation after service of one-third of your term; and I will so state freely on the record.

Now, Mr. Kelly, in your case, I would be prepared to recommend that you be sent to a minimum custody institution. Howeve,r I am not totally happy with the thought of having you go to Allenwood or the same institution with Cortes W. Randell. You want to be heard on that, counselor?

MR. BUTLER: Well, I think that a minimal correctional institution would be appropriate. Where is the next closest one?

THE COURT: Well, perhaps I should not make an issue of this.

DEFENDANT RANDELL: I have no problem.

THE COURT: I will strike that. I will recommend Allenwood which is really the only close one that I

think would be appropriate. I think that is perhaps more important to Mr. Kelly and his family than worrying about the thing that concerned me. I will change that and recommend Allenwood Correctional Facility in Pennsylvania.

DEFENDANT KELLY: Your Honor,could I ask for 40 days before reporting to sentencing because there is --

THE COURT: No, that is a little long. I will give you -- I know but the trouble is the longer you put off the day, Mr. Kelly, experience teaches it just becomes that much harder for you and your family.

DEFENDANT KELLY: I am concerned about making provisions for people.

THE COURT: I know and I expect that and here is what I am going to do. I am going to give you until the 22nd day of January. That is well in excess of three weeks, it is almost a month as a matter of fact, and again I will direct that you surrender at Allenwood no later than high noon on that day, assuming that the Bureau of Prisons agrees that that is the place they will send you.

DEFENDANT KELLY: Your Honor, I don't -- there would be no way I could pay the fine if I am in prison in 60 days.

THE COURT: Well --

DEFENDANT KELLY: I don't think. I mean I will do everything I can but --

THE COURT: I tell you what you do. I will give you until -- I will amend the sentence and judgment to give you until April 1, 1975 to pay the fine; which is to be regarded as a committed fine. All right?

DEFENDANT KELLY: Yes, sir.

THE COURT: Now, Mr. Grassi and Mr. Cortes Randell, I believe in the difficulty of the moment I neglected to impose fines which I intended to impose in respect to Mr. Randell.

MR. GRASSI: Yes, sir.

THE COURT: I meant to say and I amend the sentence as follows to add, I impose fines of $10,000 on each count, making a total of $40,000 in committed fines for Cortes W. Randell. Now I will also give him until April 1, 1975 to pay these fines. All right?

MR. GRASSI: We understand, your Honor.

THE COURT: Good day.

Mr. Bushnell, Mr. Lawler has spoken for you as you know, Mr. Bushnell, but you have the right to speak to the Court.

DEFENDANT BUSHNELL: Yes, sir.

THE COURT: What would you care to say, sir?

DEFENDANT BUSHNELL: Your Honor, over the last months and years I have learned the degree of wrongdoing that I have done; and I have done everything in my power to make myself a better person.

THE COURT: The record I think bears you out on that, sir.

DEFENDANT BUSHNELL: My main concern is my family; and I plead for mercy for them.

THE COURT: I understand. Let me put your mind at rest Mr. Bushnell, because there are two things that I think have to be said; painful as they may be. First of all, this Court does not regard you as being as culpable as these other men in this affair known as the National Student Marketing case.

Second of all, there is the point made by your lawyer Mr. Lawler, there are exceedingly heavy economic burdens, not that there aren't on the other men, strangely enough, people won't accept this but it is true, but in your case it is the worst.

Third of all, the report reflects that any kind of jail disposition in this case might be deleterious to your health. I accept that point. I don't know, it may not have been available in that portion of the report; it may have shown up in the evaluative summary and

recommendation, Mr. Lawler, but I have been troubled by this, and I believe there may be something to it; so I am going to impose a suspended sentence in his case, and put him on probation, and impose a modest fine with ample time or what I intend to be ample time to pay. I want to get that out quickly and informally for Mr. Bushnell's benefit. I feel very strongly about this for the three reasons stated.

MR. LAWLER: Thank you, your Honor.

THE COURT: Now, Mr. Bushnell, even though you know what I am going to do, is there anything else or did you finish?

DEFENDANT BUSHNELL: No, sir.

THE COURT: All right. Incidentally, your wife's all right, I should say to you, and to her through you, was extremely revealing in at least two if not all three of these regards that I just somewhat cryptically stated for the record.

Now, Mr. Robert Bushnell, like Mr. Kelly, pled guilty to Count 1 only, and this Court sentences you as follows:

I sentence you to the custody of the Attorney General of the United States for a period of six months but I suspend execution of that sentence, place you

on probation for two years, subject to the standing probation order of this Court, and I impose a fine upon you of $4,000; that fine is a committed fine. However, I give you the term of your probationary period to pay that off under a series of payments or a schedule of a series of payments to be worked out by you and the supervising probation officer in your case. That will minimize the burden economically which I want to do on you and your family.

DEFENDANT BUSHNELL: Thank you, your Honor.

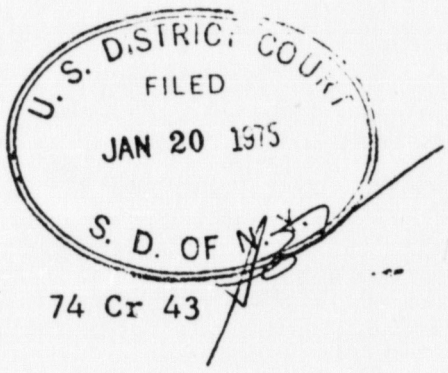
THE COURT: All right, gentlemen, good day. Thank you.

(Adjourned.)

MINUTES OF SENTENCE (KUREK)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA, :

v : 74 Cr 43

BERNARD J. KUREK, :

Defendant. :

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New York, New York,
January 10, 1975 - 2:15 PM

BEFORE:

HON. HAROLD R. TYLER, JR.,

District Judge.

APPEARANCES:

PAUL J. CURRAN,
United States Attorney;
Franklin Velie,
Assistant United States Attorney.

PLATO CACHERIS, ESQ.,
Attorney for Defendant.

THE CLERK: For sentence, US v. Bernard Kurek.

(Both sides ready.)

THE COURT: Mr. Velie, I have received, of course, your communication of yesterday which I understand defense counsel has.

MR. VELIE: Yes, your Honor. I telephoned the government's presentence memorandum to Mr. Cacheris and gave him a copy this morning.

And, in addition, I would only like to speak very briefly on one or two points, if I may be heard.

Mr. Kurek was, of course, the chief financial officer of National Student Marketing, and in the course of his duties learned that NSMC's reported earnings never materialized. Despite that, he has told us in his testimony and in his plea that he participated in the making of a proxy statement by which four additional companies were acquired in which important material facts known to him about the facts underlying the failure of NSMC -- to make these earnings known to him not revealed to the people who were acquired.

Since that time Mr. Kurek has, of course, cooperated fully with the government's investigation in the SEC and in the grand jury, and as your Honor well knows testified at the lengthy trial of the auditor defendants. The government submits that as far as we can tell his testimony was complete,

candid, accurate and truthful; and your Honor, of course, would be the best judge of that since you saw him testify at length on direct and, of course, on searching cross examination.

We wanted the Court to take all of these factors into account in this sentence.

THE COURT: Mr. Cacheris, I should say before you begin, which I think in fairness to your client and perhaps to yourself and also to shorten things, that in addition to what happened at the trial, the record is rather clear that on two matters, which I think are very important in the sentencing context, first of all, I do not believe that your client ever received any enrichment, if we may put it that way, as a result of this scheme. Not only that, I do not think he was as deeply involved as the other officials of the company, by any means.

MR. CACHERIS: I am satisfied you are correct on both counts, your Honor.

THE COURT: All right. Second of all, I think he has made a clean breast of matters and I am not just talking of his testimony here, I am talking about in the subsequent conversations which came about with your arrangements in part, I am sure, and his discussing matters with government agents and attorneys.

Furthermore, what is happening to Mr. Kurek in the business way and the family way since makes clear to me at least that no legitimate objective of sentencing could be served here by any kind of a jail term. So I think you and he should know that before you even begin. I do not want to take all the steam off your --

MR. CACHERIS: I think I will rest on that, your Honor. That was the request I was going to make. I felt he deserves it by reason of his background and cooperation, and I feel the Court's judgment is completely accurate in that case and I think he stands ready for sentence under those circumstances.

THE COURT: I notice a lot of people do not accept this but the fact is that one of the advantages in being a nisi prius judge, where you hear a trial and you sit within three or four feet of the person testifying for a good many hours, if not days, is you get what my children call, and others similarly situated, vibes, good or bad, and I would say that really, as I saw it at least during the trial, that the vibes were good so far as credibility and so on.

But more than that, I think a man who got into something that he really did not intend to be involved with, except as a reasonably capable and honest employee, I really do not think Bernard Kurek really had much more in mind than

that. He got caught in the swim, that is no doubt of that, but I do not think he was a schemer or a mover in the events which we all know took place.

All right. May I hear from your client or do you want to --

MR. CACHERIS: Yes.

THE COURT: Mr. Kurek, despite all the talking by the lawyers in the case, and that includes myself, I guess, you are entitled under our system to say anything to the Court before sentence is formally imposed, even though you know substantially what the sentence is going to be.

THE DEFENDANT: I don't have anything to say, your Honor.

THE COURT: Tell me, is the new affiliation of yours going fine as far as you are concerned?

THE DEFENDANT: The work situation?

THE COURT: Yes.

THE DEFENDANT: It's just getting off the ground. I'm trying to get it started, under these economic conditions and all the other conditions.

THE COURT: That is one reason I asked. But at least you are going forward?

THE DEFENDANT: I'm going forward on it, that's right.

THE COURT: All right. Well, you remember that a long time ago, I guess it is now, way back in early summer or last spring you pled guilty to count 2 in one of these courtrooms, and pursuant to that plea under count 2 this Court imposes sentence upon you as follows:

I sentence you to the custody of the Attorney General of the United States for a period of six months, but I suspend execution of that sentence and place you on probation for a period of two years.

Now, I am going to make that unsupervised probation. I do not feel that a man of your capabilities and background really needs to be supervised, particularly at this point after the long haul of your involvement in this litigation particularly.

But I will indicate that there must be -- it must be plain to you -- a period of probation even though it is unsupervised, and it will be subject to the standing probation order of this Court.

Very good, sir.

MR. VELIE: Thank you, your Honor.

THE COURT: Good day, gentlemen.

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JUDGMENT OF CONVICTION OF DEFENDANT NATELLI

United States of America vs. **United States District Court** for

DEFENDANT: ATHELY M. NATELLI — SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. 74 cr. 43 (HRT)

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH Dec. DAY 27, YEAR 1974

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL JOHN S. MARTIN, Esq. (Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FILED
DEC 27 1974
S. D. OF N. Y.

FINDING & JUDGMENT

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged ☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly made and caused to be made false and misleading statements with respect to material facts as in a proxy statement for NSMC dated September 27, 1969.

(Title 15 United States Code, Section 78ff, 78n;
Title 18 United States Code, Section 2.)

DOCKETED
DEC 27 1974

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 1(ONE) year pursuant to Section 3651 of Title 18, U.S.C. the defendant is confined in a jail type institution for a period of 60(SIXTY) DAYS. Execution of the remainder of the sentence is suspended and the defendant is placed on probation for a period of 10(TEN)MONTHS to commence upon expiration of confinement, subject to the standing order of probation of this Court. Committed fine of $10,000 on count 2 to be paid within 60 days.

SPECIAL CONDITIONS OF PROBATION

Defendant is continued on present bail pending appeal.

DOCKETED AS
A JUDGMENT # 75007
ON Jan. 6, 1975

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

MICROFILM
JAN 2 1975

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [signature]
Deputy Clerk

☐ U.S. District Judge
☒ U.S. Magistrate

[signature] A R Tyler, Jr.

Date 12-27-74

A 333

JUDGMENT OF CONVICTION OF DEFENDANT SCANSAROLI

United States of America vs. United States District Court

DEFENDANT: JOSEPH SCANSAROLI

SOUTHERN DISTRICT OF NEW YORK

1049

DOCKET NO. 74 cr. 43 (HRT)

SUSPENDING PROBATION/COMMITTED ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: Dec. 27, 1974

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL CHARLES A. STILLMAN, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of { [ ] NOT GUILTY. Defendant is discharged / [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly made and caused to be made false misleading statements with respect to material facts as in proxy statements for NSMC dated September 27, 1969

(TITLE 15, United States Code, Section 78ff, 78n;
Title 18, United States Code, Section 2.)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 1(ONE) year pursuant to Section 3651 of Title 18, U.S.C. the defendant is confined in a jail type institution for a period of 10(10) DAYS. Execution of the remainder of the sentence is suspended and the defendant is placed on probation for a period of 11(ELEVEN) MONTHS)20(TWENTY)DAYS to commence upon expiration of confinement, subject to the standing order of probation of this Court. Committed fine on count 2 of $2500 to be paid during the term of defendant's probation.

SPECIAL CONDITIONS OF PROBATION

Defendant is continued on present bail pending appeal

DOCKETED AS
A JUDGMENT# 75 CR 6
ON Jan. 6, 1975

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

MICROFILM

JAN 2 1975

SIGNED BY

[ ] U.S. District Judge

[X] U.S. Magistrate

H. E. Taylor Jr.

Date 12-27-74

A 334

NOTICE OF APPEAL OF DEFENDANT NATELLI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

74 Cr. 43 (HRT, Jr.)

- against -

ANTHONY M. NATELLI and
JOSEPH SCANSAROLI,

NOTICE OF APPEAL

Defendants.

----------x

Notice is hereby given that Anthony M. Natelli, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment of conviction entered in this action on the 27th day of December, 1974.

MARTIN, OBERMAIER & MORVILLO

By _____
A Member of the Firm
Attorneys for Defendant
Anthony M. Natelli
Office & P.O. Address
1290 Avenue of the Americas
New York, New York 10019
(212) 489-1500

TO:
DEFT ANTHONY M. NATELLI - 8564 HORSESHOE LANE
POTOMAC, MARYLAND
20854
301-299-5750

U.S. ATTY.

CLERK, U.S. COURT OF APPEALS

NOTICE OF APPEAL OF DEFENDANT SCANSAROLI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

- against -

ANTHONY NATELLI and
JOSEPH SCANSAROLI,

Defendants.

----------x

NOTICE OF APPEAL

74 Crim. 43 (HRT, Jr.)

Name and Address of Appellant:

JOSEPH SCANSAROLI
R.D. #2
Ebensburg, Pennsylvania 15931

Name and Address of Appellant's Attorneys:

MORRISON, PAUL, STILLMAN & BEILEY
110 East 59th Street
New York, New York 10022

Offense: Violation of the Federal Securities Laws, particularly the Security and Exchange Commission proxy requirements (Rules and Regulations under 15 U.S.C. §77n) together with violations of 15 U.S.C. §78ff and 18 U.S.C. §2.

Notice is hereby given that defendant Joseph Scansaroli appeals to the United States Court of Appeals for the Second Circuit from the final judgment of conviction and from each and every part and from the whole thereof entered in this action by the Honorable Harold R. Tyler, Jr., United States District Judge on December 27, 1974, whereby defendant was sentenced, pursuant

to 18 U.S.C. §3651, to a term of one year the imposition of which was suspended for all except ten (10) days and placing defendant on unsupervised probation for the balance together with a fine of $2,500 and from the order denying defendant's motion pursuant to Fed. R. Crim. P. 29(c) and 33 entered in this action on December 27, 1974.

Appellant is presently at liberty under a personal recognizance bond.

Dated: New York, New York
December 30, 1974

MORRISON, PAUL, STILLMAN & BEILEY

By: Charles A. Stillman
A Member of the Firm
Attorneys for Defendant
Joseph Scansaroli
110 East 59th Street
New York, New York 10022
(212) 593-0100

TO: PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007